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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

WILLMUT GAS & OIL COMPANY, *Petitioner*

v.

UNITED GAS PIPE LINE COMPANY, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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OCTOBER TERM, 1957

No.

WILLMUT GAS & OIL COMPANY, *Petitioner*

v.

UNITED GAS PIPE LINE COMPANY, ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioner is Willmut Gas & Oil Company (Willmut), complainant in the Chancery Court of Forrest County, Mississippi, suing on behalf of its consumers exclusively as to intrastate gas, and appellee in the Supreme Court of Mississippi. Respondents are United Gas Pipe Line Company (United), defendant in the Chancery Court and appellant in the Supreme Court of Mississippi, along with Fidelity & Casualty Company of New York, surety.

OPINIONS BELOW

There was no written opinion in the Chancery Court of Forrest County, only a decree. The opinion of the Supreme Court of Mississippi on original hearing, being the highest court wherein such decision may be rendered, is not yet officially reported, but appears in

97 So. 2d 530 (Appendix I hereto). The dissenting opinion of Mr. Justice Hall on overruling the Suggestion of Error is not officially reported, but appears in 100 So. 2d 609 (Appendix II hereto). The Opinion and Order No. 252 of the Federal Power Commission in Proceeding G-1158, 99 PUR (NS) 65, —— FPC ——, is Appendix III hereto.

JURISDICTION

The decree of the Chancellor was rendered upon November 23, 1956; the judgment of the Supreme Court of Mississippi was rendered on October 21, 1957; the suggestion of error was overruled on February 24, 1958; and the motion to stay mandate and to transmit segments of the original record was sustained on April 14, 1958. The statutory provisions conferring jurisdiction are 62 STAT. 929 (Title 28, U.S.C., Sec. 1257), in connection with the provisions of the Natural Gas Act, 52 STAT. 821, 15 U.S.C., Sec. 717, et seq. (the Act). See also SUPREME COURT RULE 19; said decision being probably "not in accord with applicable decisions of this Court" as precedently rendered and, with deference, also hereasto "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this Court's power of supervision."

QUESTIONS PRESENTED

I. Does the Natural Gas Act deprive a competent State Court of all jurisdiction as to "one of the oldest forms of relief in our law"—the right of civil recovery by persons compelled to pay unreasonable or discriminatory rates to utilities, though a natural gas company? Does said Act so emasculate the common

law as that the State Courts may not even adjudge whether or not the subject matter, natural gas, is intrastate or interstate, and render relief accordingly; at all times, of course, subject to Federal review here? In short, has such State jurisdiction become extinct?

II. Does the Natural Gas Act, as to interstate gas, exclusively usurp, as to intrastate gas, State jurisdiction as to the admeasurement of liability of a utility for exaction of unlawful rates and preclude absolutely reparation, and reward the tort feasor with that which was unlawfully taken from the wronged consumer?

III. As to the southern segment of Willmut's system, does a contaminating factor of (possible) interstate gas of 1/40th of 1% of the entire gas mass free the tort feasor from civil responsibility when the tort feasor has consciously elected to situs the entire gas mass as intrastate, and there is present in the main, wherefrom the incursion was, more than ample intrastate to conform to *Peoples Natural Gas Co.* v. *Public Service Commission*, 270 U.S. 550, 70 L. ed. 726?

IV. When the dispatcher of United negligently fails to maintain the system pressure as contemplated and by an extraordinary cold snap, there is a possible intrusion of contaminating interstate gas, does such negligence, in virtue of the terms of the Natural Gas Act, acquit the tort feasor from State imposed liability for excessive rates exacted?

V. Does the doctrine of *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 100 L. ed. 373, and companion cases, apply where the contract between the parties makes rate fixation by arbitration

a condition precedent, and United thereasto arbitrarily breached its agreement?

VI. Was there not a contravention of both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment when the Supreme Court of Mississippi assumed to reverse the Chancellor's decree in favor of Willmut and to render a final judgment against Willmut, conclusively depriving Willmut and its customers of a constitutional hearing by wrongfully assuming to know that of which it was judicially ignorant. We, as officers of the Court, assure the Court that Willmut could have shown that there was intrastate gas exclusively under Mississippi's sovereignty, wherefor alone suit was brought on behalf of the ultimate consumers and for which, as reflected by Judge Hall's opinion, recovery had; there being no dissent as to the right of recovery in this aspect through Willmut suing in this class action. *Federal Power Com.* v. *Interstate Nat. Gas Co.*, 331 U.S. 693, 91 L. ed. 1749; and *Independent Linen Service Co.* v. *Stone*, 192 Miss. 832, 6 So. 2d 110.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717, et seq., are set out in Appendix IV hereto. The Fifth Amendment, the Tenth Amendment, and the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States are set out in Appendix IV hereto.

STATEMENT OF THE CASE

This suit was filed by Willmut, a local distributor of natural gas, on behalf of itself and its customers,

against United, averring the exaction of unlawful rates, as set out in paragraph three of its Complaint:

> "This suit concerns solely and only gas originated by United within the State of Mississippi, transported exclusively by United within the State of Mississippi and delivered exclusively by United for consumption by Willmut within the State of Mississippi, having herein naught to do with the interstate movement of natural gas delivered by United to Willmut * * *."

Willmut sought recovery upon the grounds of the exaction by United of all amounts unlawfully collected, praying thereasto that:

> "* * * this Court will fix a just, reasonable, non-preferential and non-discriminatory rate for the intrastate gas delivered by United to complainant and award a decree to complainant for the difference between said sum so fixed and the amount actually paid by said complainant to said United and that after deduction of appropriate costs, complainant be authorized and empowered to distribute to its consumers that whereto they are lawfully entitled, this court fixing the just and reasonable rate which should have been collected and would have been collected if United had complied with the law (of Mississippi) * * *".

The amount collected by United over the lawful State rate is estimated at One Million Dollars.

United primarily raised the question of jurisdiction of the State Court to grant *any relief*, being compelled to admit, for the purposes of the motion, that the gas sued for was exclusively intrastate. United's viewpoint, sustained by the State Supreme Court, is accurately reflected in the conclusion of the first ground to dismiss:

> "* * * primary jurisdiction rests in the Federal Power Commission, and this Court is without statutory or constitutional right or power to entertain the cause, or to undertake to hear and determine the same; Complainant has no rights, claims or causes or rights of action except under the Constitution and laws of the United States of America and, particularly, the Natural Gas Act, and for this court to in any wise assert jurisdiction over the subject matter of this suit would be to deprive Defendant of its property, rights and privileges under the Natural Gas Act without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and also in violation of the commerce clause in Article One, Section 8 of said Constitution * * *."

And after repetition, United then filed an answer, traversing the facts, but only upon condition that the jurisdictional question had precedently been disposed of.

From 1943 until approximately January 1, 1947, United, pursuant to certificates issued by the Federal Power Commission under Section 7(c) of the Act, sold and delivered to Willmut gas produced primarily in Texas and Louisiana. United charged Willmut a rate of 25¢ per Mcf under an express contract (Exhibit "C" to Complaint), which was filed with the Federal Power Commission pursuant to Section 4(e) of the Act; but this rate expired expressly July 25, 1947.

In 1947, when United commenced to take gas from the Gwinville Field in Mississippi, it physically rearranged its pipeline system (save at East Jackson) so as to discontinue the flow of interstate gas from

Texas and Louisiana to Willmut, and replaced it with intrastate gas from the Gwinville, Mississippi field. As a result of these rearrangements, as to the northern segment of Willmut's system, no interstate gas was delivered to Willmut between July 25, 1947 and June 30, 1953; as to the southern segment, no interstate gas flowed to Willmut after approximately November 1, 1950 to June 30, 1953; but there were seven alleged incursions, totaling 29½ hours, with a physical content of not in excess of 1/40th of 1%.

Willmut and the City of Hattiesburg, Mississippi, filed a complaint with the Federal Power Commission (G-1158), seeking relief principally because of abandonment by United, under Section 7(b) of the Act, of its interstate facilities, claiming reparations and for an adjudication as to unreasonableness of past rates and fixation of a lawful rate. United challenged the jurisdiction of the Commission.

The Federal Power Commission, after full hearings, on June 1, 1953, issued Opinion and Order No. 252, (Appendix III hereto). The Opinion and Order found that United's rearrangement of its system constituted both a physical abandonment of facilities and an abandonment of service in interstate commerce rendered by means of such facilities, without the approval of the Commission, all in violation of Section 7(b) of the Natural Gas Act. It held that this illegal abandonment of facilities and service, and the substitution of intrastate service therefor did not deprive the Commission of jurisdiction to entertain the complaint. It ordered United "to restore and re-establish the facilitities and resume the interstate service as rendered to Willmut prior to February 6, 1947."

By the same Opinion and Order, the Commission found that "by its failure without lawful justification to make natural gas available to Willmut at the same rates or charges voluntarily established (for another customer), United is unlawfully subjecting Willmut to undue prejudice and disadvantage; and unlawfully granting undue preference and advantage (to that other customer) and that such practices by United are * * * unlawful, in violation of the provisions of the Act." The Commission, therefore, ordered United to reduce its rate to Willmut from 25¢ per Mcf to 17.5¢ per Mcf for domestic gas.

Willmut filed a bill, on behalf of itself and its customers for the recovery of excessive, discriminatory and unlawful rates charged by United for intrastate gas delivered to Willmut to June 30, 1953, the date on which United complied with Order No. 252 of the Commission. United filed a motion to dismiss the bill on the ground that the Federal Power Commission had exclusive jurisdiction over the subject matter. The Chancery Court overruled this motion. On an interlocutory appeal, the Supreme Court of Mississippi held:

> "The jurisdiction of the Federal Power Commission having attached to *all natural gas sold to Willmut*, there is *no residual jurisdiction* for independent court action. The *local component (of gas) lost its intrastate character* and there *remained no power* in the courts to apply the common law of the State.
>
> "The chancery court *erred* in not sustaining the motion to dismiss the bill *for want of jurisdiction to determine the issues presented*, and its order is therefore reversed. On interlocutory appeal we ordinarily remand the case to the trial court, but

> in this case *no additional or amended pleading* could enable Willmut to maintain its suit. It would serve no purpose to remand the cause, and final judgment will be rendered here dismissing the bill." (Emphasis ours unless otherwise noted)

So holding, the Court reversed the order of the Chancery Court and entered final decree dismissing the bill. Thereupon Willmut filed a Suggestion of Error, sharply calling to the Court's attention that it confined the recovery for itself and its customers exclusively to intrastate gas and had been denied, through the dismissal on the merits, a Constitutional hearing.

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

State Common Law Right of Recovery as to Intrastate Commerce Not Destroyed by Natural Gas Act.

1. The monumental question here is narrow, but most far-reaching, primarily as phrased by Mississippi's Court:

> "The Chancery Court erred in not sustaining the motion to dismiss the bill for *want of jurisdiction to determine the issues presented*, * * *."

If Mississippi's Court had no jurisdiction to determine whether this gas was interstate vel non and adjudge thereasto, subject to review here, then Chapter 372, *Laws of Mississippi, 1956*, as to natural gas, and all its precedent statutes regulating intrastate matters contravened the Federal Constitution. Such State sovereignty as to intrastate movement has been uniformly sustained since the "Railroad Commission

Cases," (*Stone* v. *Farmers Loan & Trust Co., et al.*), 116 U.S. 307-356, 29 L. ed. 636, up to *Chicago, Milwaukee, St. Paul & Pacific R. Co.* v. *Illinois,* 78 S. Ct. 304, 2 L. ed. 2d 292. Where such vital issues as to State and National power exist, this Court must interpose to preserve the appropriate balance. *Detroit* v. *Murray Corp.,* ——U.S. ——, 78 S. Ct. 458, 2 L. ed. 2d 441.

At common law, until altered by administrative regulation, the right of recovery for an unlawful exaction by a utility was thus commented upon by Mr. Justice Frankfurter in *Montana-Dakota Utilities Co.* v. *Northwestern P.S.C.,* 341 U.S. 246, 95 L. ed. 912:

> "The right of civil recovery by persons compelled to pay unreasonable or discriminatory rates to common carriers is one of the oldest forms of relief in our law. * * *"

And four members of this Court thought, under the circumstances there delineated, that:

> "* * * And even if the effect of awarding relief is ultimately to benefit Montana-Dakota (Willmut), it certainly has a better claim to the exacted funds than Northwestern (United). * * *"

As commented by Circuit Judge Prettyman in *U. S.* v. *Davidson Transfer & Storage Company, Inc.,* U.S.C.A. No. 14123, decided April 24, 1958:

> "Absent a statute creating a special forum, a shipper's common-law rights were enforceable in court upon a complaint seeking reparations for unreasonable charges collected by a carrier. * * * Arizona Grocery v. Atchison, Topeka & Santa Fe Ry., supra; Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 436, 51 L. Ed. 553, 27 S. Ct. 350 (1907); Lewis-Simas-Jones Co. v. Southern Pac. Co., 283 U.S. 654, 660, 75 L. Ed. 1333, 51 S.

Ct. 592 (1931); Interstate Commerce Comm'n v. Cincinnati, New Orleans & T. P. Ry., 167 U.S. 479, 505-506, 42 L. Ed. 243, 17 S. Ct. 896 (1897); Interstate Commerce Comm'n v. Baltimore & Ohio R. R., 145 U.S. 263, 36 L. Ed. 699, 12 S. Ct. 844 (1892); Dow v. Beidelman, 125 U.S. 680, 687, 31 L. Ed. 841, 8 S. Ct. 1028 (1888); Western Union Tel. Co. v. Call Pub. Co., 181 U.S. 92, 102, 45 L. Ed. 765, 21 S. Ct. 561 (1901); Mitchell Coal Co. v. Pennsylvania R. R., 230 U.S. 247, 264, 57 L. Ed. 1472, 33 S. Ct. 916 (1912); Tift v. Southern Ry., 138 Fed. 753, 759 (C.C.W.D. Ga. 1905), aff'd. 206 U.S. 428, 51 L. Ed. 1124, 27 S. Ct. 709 (1907); Smith v. Chicago & N.W. Ry., 49 Wis. 443, 5 N.W. 240 (1880); West Virginia Transportation Co. v. Sweetzer, 25 W. Va. 434, 444 et seq. (1885); BEALE & WYMAN, RAILROAD RATE REGULATION 12-15 (1906); II SHARFMAN, INTERSTATE COMMERCE COMMISSION 393-406 (1931). * * *"

2. The State Court primarily assumes to follow, but, with deference, has totally misconceived the *Montana-Dakota* Case, and to destroy, upon the merits, by the Act the right of civil recovery. The *Montana-Dakota* Case, with deference, blasts the State Court's opinion. Thereasto this Court was unanimous. Note that the State Court said that the Chancery Court had no "jurisdiction to *determine the issues presented*;" that is, was this intrastate gas or interstate gas, and if intrastate, had United wrongfully charged the consumers 25¢ per Mcf?

A. Mississippi's Court palpably became confused as to the jurisdiction to hear and the power to decide on the merits after jurisdiction was taken; (*Montana Dakota Util. Co. v. Northwestern P.S.C.*, supra, p. 917):

> "As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action. * * *"

This Court held, in virtue of the discredited claim of Montana-Dakota, that Montana-Dakota properly sued in the District Court, notwithstanding there had been no administrative fixation. Compare *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 1 L. ed. 2d 126. So, therefore, the Chancery Court, under this decision, had jurisdiction to decide on the subject matter.

Mr. Justice Jackson further said, *Montana-Dakota*, p. 249:

> "We think there was power in the District Court to decide whether the claims so grounded constitute a cause of action maintainable in federal court and, if so, whether it is sustained on the facts. We think a direction to dismiss for want of jurisdiction was error and that it should not stand as a precedent. However, it is clear that the reason underlying the Court of Appeals' decision was that no federal cause of action was established. If this was correct, we should sustain the judgment of reversal, though on other grounds than those stated. * * *"

B. The State Court fundamentally overlooked that the *Montana-Dakota* decision held that there was primary Federal jurisdiction, in virtue of a claim made under the Federal statute, the Justice saying:

> "* * * The Judicial Code, in vesting jurisdiction in the District Courts, *does not create causes of action*, but *only confers jurisdiction to adjudicate those arising from other sources*

> which satisfy its limiting provisions. Petitioner asserted a cause of action under the Power Act. To determine whether that claim is well founded, the District Court *must take jurisdiction*, whether its ultimate resolution is to be in the affirmative or the negative. * * *"

Thereunder the primary jurisdiction of the State Court was untouched, precisely as this Court held as to the jurisdiction of the District Court, and no provision of Mississippi's Constitution conferring jurisdiction on the Chancery Court was in any way affected.

After holding justiciable, Mr. Justice Jackson further declared; p. 251:

> "* * * Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. * * * To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission. * * *"

Primarily, before the Act, this function was judicial, and so was in Mississippi at the time of the suit; the difference being that where the matter was administrative under the Act, the Commission had to act in accordance with its statutory authority, while in Mississippi the Court could act just as Mr. Justice Brewer held it could do in *Western Union Teleg. Co. v. Call Pub. Co.*, 181 U.S. 92, 46 L. ed. 765.

As to what were the actual facts as to this intrastate gas, the State Court having held that the Chancery court could not pass on it, is in a measure, therefore, here irrevelant on this question of jurisdiction; but Willmut filed a Suggestion of Error, which was noticed by Mississippi's Court and overruled; and, as a part

thereof, attempted to bring before that Court all of the evidence in G-1158. These facts will be, for the Court's guidance, hereinafter epitomized to show the fundamental necessity for certiorari herein.

Montana-Dakota properly failed, not for want of jurisdiction, but on the merits. In the case at bar, suing on behalf of its customers, Willmut ten years ago impetrated G-1158 before the Commission upon the ground inter alia that there was an unlawful discrimination as at July 25, 1947 by reason of United giving to a former affiliate a 17.5¢ rate, while refusing to appraise, and arbitrarily collecting 25¢ from the customers through Willmut. *Central State Elec. Co.* v. *Muscatine*, 324 U.S. 138, 89 L. ed. 801. The Federal Power Commission in G-1158 made an unequivocal administrative finding and order in Willmut's favor and against United.

Under *Cromwell* v. *Sac County*, 96 U.S. 51, 24 L. ed. 681, if the cause of action be regarded as identical, there has been in favor of Willmut and against United an adjudication; but if the cause of action be different, there is equally effective a collateral estoppel after five years litigation.

So Willmut brings to this Court, with deference, that made requisite by the majority in the *Montana-Dakota* case, having legitimately obtained precedently from the Commission that which this Court then held could not be referred to the Commission. Compare *United States* v. *T.I.M.E.*, 252 F. 2d 178 (1958); *United States* v. *Davidson Transfer & Storage Co., Inc.*, supra.

C. Montana-Dakota, as pointed out by the Federal Power Commission in its intervention, recouped its

losses from its customers; yet four members of this Court thought that even then it should have prevailed by reason of the tort against it. When the Court of Appeals for the Fifth Circuit was distributing that impounded as a result of the litigation in *Federal Power Commission* v. *Interstate Natural Gas Co.*, 331 U.S. 693, 91 L. ed. 1749; 336 U.S. 577, 93 L. ed. 895, the Commission took the position (which in large measure influenced the bringing of this suit) that the ultimate consumers of the public utilities had to receive the benefits. What the position of the Commission would have been in the *Montana-Dakota* case had Montana-Dakota not reimbursed itself is not a matter of record and thereasto a decision should be in the public interest.

D. Unquestionably, this 50% excess so collected by United from the ultimate consumers was an unlawful collection by it under the unanimous opinion, as we understand it, in the *Montana-Dakota* case; Mr. Justice Frankfurter declaring:

> "The Power Act is explicit that *any* 'rate or charge that is not just and reasonable is *hereby declared to be unlawful.*' * * *"

The Act says, "*all*"—no exceptions.

This million dollars so unlawfully in the hands of United was substantially a trust fund, whereasto United was without equitable rights; these inhered in the consumers. Compare *Talcott* v. *Pine Grove*, Fed. Cas. 13735; s.c. *Pine Grove* v. *Talcott*, 86 U.S. 666, 22 L. ed. 227:

> "* * * The Judicial personage, the corporation, created by the sovereign power expressly for this

sole purpose and no other, is in the most strict, technical and unqualified sense *but its trustee.*

"* * * The neglect of the smallest of these duties in which the community is interested will be enforced by the public writ of mandamus."

Note s.p. *Acme Brick Co.* v. *Arkansas Public Service Com.*, 25 L.W. 2399, (Ark. Sup. Ct. 1957).

The consumers, for whom this action is, were entitled under Mississippi's law to this Mississippi gas from Gwinville at a just and reasonable rate, non-discriminatory. This movement was not in excess of 100 miles and yet for it United was charging 25¢, while transporting foreign gas to Jackson hundreds of miles at 17.5¢. As to all rates other than those at East Jackson, the State had jurisdiction in its Court to simply try an intrastate transaction whereasto the customers were entitled to relief. To compel Willmut and the customers to have a full-dress rate hearing, involving the entire United system, would, with deference, have contravened the rule in *Ex Parte Young*, 209 U.S. 123, 52 L. ed. 714.

3. The State Court assumes to apply the *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 89 L. ed. 1150, which, with deference, (1) as to jurisdiction of the Chancery Court, is not apposite; but, (2) if there were, as Willmut contends, naught but intrastate gas, is directly controlling contra. Therein this Court said:

"* * * Two days before its effective date and frankly for the *purpose of avoiding Federal regulation* the Company rearranged its operation with intent *to cut every connection and discontinue every facility* whose continued operation would

render it subject to the Federal Power Commission's control. The Commission conceded in its opinion and the Government admits here the Company's right to do so. * * *"

4. The State Court assumes to apply *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414, 72 S. Ct. 843, 96 L. ed. 1042. Hereasto, with deference, as to jurisdiction, it is not apposite. There was a unit operation of hydro and steam power interconnected and the rise and fall of the Susquehanna River regulated; but here, if we may examine the facts, after the Gwinville Field was connected up and gas moved southward through Hattiesburg into the Mobile 16-inch line, it was not intended that there should be any backflow of interstate gas (if it were such) from the 16-inch main, United's Superintendent testifying:

"* * * that was not a normal operating condition on December 25, 1948, when gas flowed from the 16 inch back into the 8-inch. That was strictly an abnormal condition."

5. *Wisconsin-Michigan Power Co.* v. *Federal Power Commission*, 7 Cir., 197 F. 2d 472, is next relied upon by the State Court. Thereto should be added, *Wisconsin Power & Light Co.* v. *F.P.C.* (USCA, D.C.), 201 F. 2d 183, 186, wherefrom it affirmatively appears that when the four municipalities received exclusively Wisconsin power, the Commission had no jurisdiction. Compare the position of the Commission that the State's power was paramount; *North Dakota* v. *Federal Power Commission*, (CA 8), 247 F. 2d 173, where the factual set-up, if it might be considered, is strikingly similar. Compare *City of Hastings* v. *Federal Power Commission*, (CA, D.C.), 221 F. 2d 31,

cert. den. 349 U.S. 920, —— L. ed. ——; *City of Hastings* v. *Kansas-Nebraska Natural Gas Co., Inc.*, (CA 8), 226 F. 2d 413; *Humble Oil & Refining Co.* v. *Texas & Pacific Ry. Co.*, —— Tex. ——, 289 S.W. 2d 547.

6. Note *Peoples Natural Gas Co.* v. *Public Service Commission*, supra. This decision Mississippi's Court disregarded, following opposite counsel, when thereasto they said:

> "The People's Case has not been officially overruled, but it has been positively repudiated and particularly so since the passage of the Natural Gas Act. There has been no necessity on the part of the Supreme Court to officially overrule the People's Case, for since the passage of said Natural Gas Act, it is no longer applicable, as Congress has now exercised its paramount power."

It was, nevertheless, followed by Mississippi's Court in *Southern Bus Lines, Inc.* v. *Amalgamated Ass'n.*, 205 Miss. 354, 38 So. 2d 765, 771.

7. Under Mississippi's decision, *Steele* v. *Palmer*, 41 Miss. 88, and *Porterfield* v. *Butler*, 47 Miss. 165, 170, a judgment rendered without and beyond the issues is a nullity, and the fundamental Constitutional issue here is: Has Mississippi lost through the Act the power to prescribe a public policy as to strictly intrastate gas and, in virtue of that, to compel tort feasors to make good unlawful exactions? Compare especially *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 88 L. ed. 333, 349, and *Panhandle Eastern Pipe Line Co.* v. *Public Service Com.*, 332 U.S. 507, 92 L. ed. 128, 139.

8. The effect of the Act is exclusively through an implied repeal and unless the Act makes this recovery

from the tort feasor unlawful, it is preserved. Compare *Texas & P.R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 51 L. ed. 553.

9. Most probably it was not within the Congressional intent to interfere with this local tort liability. *United Construction Workers* v. *Laburnum Construction Co.*, 347 U.S. 656, 98 L. ed. 1025.

10. As definitely indicating the trend toward rectification, compare *U. S.* v. *Davidson Transfer & Storage Company, Inc.*, supra, and *U. S.* v. *T.I.M.E., Inc.*, supra.

There is no difficult question of proration between the interstate and the intrastate movement. In this case, each is separate and distinct, or at least separable, and when thus separable, no question of the National law superseding the State law can arise; it is obligatory upon this Court, if these may be reconciled and made operative, so thus to do. Compare *Peoples Natural Gas Co.* v. *Public Service Commission*, supra.

It might be that the jurisdiction of the Federal Power Commission to prescribe future rates for sales of gas in interstate commerce carries with it the ancillary jurisdiction to regulate the rates for sales in intrastate commerce; (Note *King* v. *United States*, 344 U.S. 254, 97 L. ed. 301; and *Houston, E. & W. T. R. Co.* v. *United States*, 234 U.S. 342, 58 L. ed. 1341); but the law looks with disfavor upon forfeitures.

The property of these 12,000 gas consumers aggregated One Million Dollars. There was no requirement that the State rate be published. The interstate rate, if applicable, had expired July 25, 1947 and the total deviation from the alleged lawful rate

(assuming to have so been) would have equalled as to each customer per month only a deviation amounting to $.0003, which, with deference, is certainly *de minimis* and wholly inadequate to acquit a tort feasor from liability. We allocate 99.98% to State power and 1/40th of 1% to the National sovereignty.

Had United sought and obtained from the Federal Power Commission permission to abandon its interstate service to Petitioner and then substituted intrastate service therefor, there can be no doubt that its sales in intrastate commerce would have been regulable by the State of Mississippi. Can the result be different simply because it possibly illegally abandoned interstate service and substituted intrastate service therefor? The answer must be no. To answer yes is to say that United may profit from its own wrongdoing—that by the device of attempting to violate the Federal law, it may gain exemption from the application of State law.

Surely when Congress had in mind a specific chasm that had to be bridged to vouchsafe complete and satisfactory regulation, it did not, by thus bridging, divest the states of that sovereignty requisite and necessary to protect the consumers of gas within their boundaries. In short, Congress never struck down this state power where, as here, it could be exercised without impinging in the slightest upon that which Congress did, especially when United assumed to act under and in accordance with the law of Mississippi and to set at naught the Natural Gas Act. When cast, it certainly is not lawful for United to use the Natural Gas Act as a sword with which to take from those wronged by it that which the State law gave them.

It is submitted that before the utility may wrongfully appropriate the excess over the just and reasonable rate for the service rendered, there must be an express statutory provision thus clearly donating. It is in contravention of the Constitution to vest the property rights of these gas consumers under Mississippi's law in the wrongdoing utility. Compare *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55, 76, 81 L. ed. 510, 521.

II.

State Jurisdiction to Adjudge Whether Intrastate Gas Upon Which a Utility Has Exacted Excessive Charges Must Remain, Under the Constitution, With the Courts of Mississippi, Subject to Review Here.

The State Court, as to strictly intrastate gas, has unconstitutionally burdened the Federal judiciary and the administrative agencies of the United States by this opinion with the obligation administratively and judicially to determine fundamental questions which are strictly local and wherewith the Federal Government has naught to do. The State Court has held that the petitioner and its customers might not, in a State Court of competent jurisdiction, file a common law count against the utility in the form shown infra (pp. 23-24); but, with deference, the original complaint is so thus specifically limited and, without amendment, appropriately asserted only local jurisdiction. The growing burden of increasing Federal litigation would be monumentally augmented if this decision be allowed to stand.

A. As *to all gas in the Natchez segment* (which was separate and apart from that in the Southern segment):

(1) There never was between July 25, 1947 and June 30, 1953 a single molecule of extra-Mississippi gas within the northern segment of Willmut's system. The rights therein have been lawfully individualized by *Independent Linen Service Co. v. Stone*, supra, applying substantially the doctrine of *Federal Power Commission* v. *Interstate Natural Gas Co.*, supra, that each of the individual users were severally entitled to separate reparations originating through Willmut.

(2) Where the sole movement was intrastate without contaminating interstate intrusion, exclusive jurisdiction remained in the State and the Act had absolutely no application under its express terms. Section 717, Title 15 *U.S.C.A.*, p. 177. The Supreme Court of Mississippi could not construe the Act so as to include thereunder that which the Constitution and Congress expressly prohibited.

(3) To demonstrate that there was in this Northern segment only intrastate gas without the admixture of a single molecule of interstate gas, we have:

(a) The under-oath declaration of United in Docket No. G-1158:

> "8. * * * However, Respondent shows that except for the town or community of East Jackson in Rankin County, Mississippi, the natural gas delivered and sold to Willmut has been for a long time and is now wholly produced transported and consumed within the State of Mississippi."

(b) Adverting to the findings of the Commission, Opinion No. 252, it is said:

> "* * * United effected a discontinuance of the flow of interstate gas from the Jackson-Mobile line into the Jackson-Hattiesburg line except through

> the connecting link at or near the southern terminus of the later line. * * *"

The finding of the Commission as to this Northern segment is unequivocal and positive.

(c) United, in Docket G-1158, put on the stand its General Pipe Line Superintendent for the Eastern Division, who swore that there was no interstate gas in this segment (quoted herein), and is presently in this Court. When United intended to rely upon the record in G-1158, the entire record, including the evidence, should have been put in. Compare *Pate* v. *Evans*, Miss. , 97 So. 2d 737; *True-Hixon Lbr. Co.* v. *Thorn*, 171 Miss. 783, 158 So. 909.

(d) Note a judicial admission before the Commission to that effect, as to Docket G-708, where United constructed the line to Philadelphia without a certificate of convenience, having assured the Commission that no interstate gas could be therein:

> "As shown in the lower insert on the map attached, we propose to cut the present Jackson-Hattiesburg 8" line at the point where the Gwinville tap line crosses same and connect it to the Gwinville tap with a check valve installed on the line serving Hattiesburg which will permit the passage of gas south toward Hattiesburg and prevent any gas flow north towards Jackson."

(e) Commissioner Draper, in dissenting, (Opinion and Order No. 252, App. IV), declared:

> "The fact that these transactions were formerly interstate is not disputed. The fact that their conversion to an intrastate status by United is a fait accomplis is not disputed. * * *"

(f) The Commission, in its Opinion No. 252, said (pp. 6, 9, App. IV):

> "And this conclusion is not affected by the *incidental fact* that United has replaced that service by intrastate service in a manner satisfactory to it. * * *"

Compare *Missouri ex rel. Southwestern Teleph. Co.* v. *Missouri Public Service Com.*, 262 U.S. 276, 67 L. ed. 981.

(g) The Opinion and Order in G-1158 controls, when in conflict, United's claims thereasto. *Wilbur* v. *United States of America ex rel. Chestatee Pyrites & Chemical Corp.*, 288 U.S. 97, 77 L. ed. 638.

The evidence before the Commission could not have been considered by the Court for it thus expressly declared "want of jurisdiction to determine the issues presented."

B. *As to the gas in the Southern Segment:*

(1) From November 1, 1950 to June 30, 1953, no molecule of interstate gas was likewise in the southern segment; it being assumed that the southward movement would have purged within thirty days. United consciously selected the intrastate performance and having so thus done, it would have been a deprivation of property for the State Court to integrate a liability admeasured by a different law. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 78 L. ed. 1178.

(2) The period from July 25, 1947 to October 3, 1950 presents two different aspects:

(a) Christmas Day, 1948. There was a normal movement of intrastate gas until suddenly and unexpectedly

a cold wave appeared at Hattiesburg, with reference to which the dispatcher of gas made a faux pas in not appropriately and properly opening valves to augment the local supply. The construction of the system was that this gas should move South from Gwinville into the 16-inch main at Hattiesburg and such was the normal movement; but as said by Superintendent Poindexter of United, (quoted supra, p. 12) the intrusion from the 16-inch main was not in any way normal.

So, may United, furnishing, in accordance with its election, intrastate gas and thereby incurring a tort liability, be relieved of that tort liability by a further negligent act? With deference, negligence cannot appropriately juggle the interplay of State and National power.

(b) The other occasions upon which there was a possible intrusion of contaminating gas.

United may not thus voluntarily shift its responsibility from local to national by a voluntary act. The potential amount of interstate gas was so small as to be within the rule *de minimis*.

When United thus declared that all of this gas was delivered as intrastate, with a corresponding responsibility, there was no intention of the Natural Gas Act to import its obligations to regulate that whereasto State sovereignty had always been adequate and complete.

III.

Mississippi's Court Declined to Apply Peoples Natural Gas Co. v. Public Service Commission, 270 U.S. 550, 70 L. ed. 726

The Supreme Court of Mississippi overlooked the fundamental factor that the gas in the 16-inch Mobile line, wherefrom this contaminating invasion is alleged to have occurred, contained sufficient intrastate gas

to make good the entire invasion. Into this 16-inch Mobile line, there was a 12-inch line that ran from Gwinville and discharged thereinto Gwinville gas. Likewise it can be shown that into the same line, there was a movement of local gas from the Soso Field and possibly other fields; but unmindful of the Federal law, Mississippi's Court undertook to directly overrule that which was held unanimously by this Court in *Peoples Natural Gas Co.* v. *Public Service Commission*, supra:

> "As respects the Pennsylvania gas we think it must be held to be in intrastate commerce only. Feeding it into the same pipelines with the West Virginia gas works no change in this regard. Of course after the commingling the two are undistinguishable. But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So, for all practical purposes the two are separable and neither affects the character of the business as to the other. * * *"

United States v. *Public Utilities Commission*, 345 U.S. 295, 97 L. ed. 1020.

Willmut fails to find any decision of this Court wherein the common law liability in favor of those consuming intrastate gas and charged therefor an exorbitant rate were deprived of the right of recovery by the Act. Its superseding effect was strictly limited to that which was requisite to make the Act effectual. *Texas & P.R. Co.* v. *Abilene Cotton Oil Co.*, supra.

IV.

Mississippi's Court Fundamentally Failed to Recognize United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 100 L. ed. 373, and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 347, 100 L. ed. 388, When Willmut and United Had an Express Contract Requiring Rate Fixation After July 25, 1947, by Arbitration.

1. In *Memphis Light, Gas & Water Div.* v. *Federal Power Com.*, 250 F. 2d 402, now pending on certiorari, 2 L. ed. 2d 420, Circuit Judge Washington said:

> "* * * *Doubtless the contracting parties could have agreed on a third party to arbitrate a dispute when the seller sought to raise its price.* But the Federal Power Commission has not been given that arbitration function by statute."

2. Note Exhibit "H-3" produced by United as a predicate for the Court's action. This was an exhibit to United's pleading and it is bound thereby:

> "With reference to the *agreement of August 20, 1943*, between the undersigned as 'Seller' and you as 'Buyer', relating to the sale and purchase of gas for resale and distribution as specifically set forth therein, under date of May 7, 1946, we wrote you a letter calling your attention to the provision of Article VII of said contract specifying the price to be paid for all gas sold and delivered thereunder during the period ending July 25, 1947, and to the further provision that the price to be paid during the succeeding 5-year period *shall be determined by agreement between the parties*, and in which we proposed to extend during the 5-year period beginning July 25, 1947, the rate that is in effect on July 24, 1947. You replied by letter dated June 21, 1946, in which you advised, in effect, *that you would not accept the proposed extension agreement.*

"The above *contract provides for arbitration in the event the parties should fail to agree upon a price for any five year period subsequent to July 25, 1947.* However, since the *Federal Power Commission presently has jurisdiction* over the price to be paid for gas sold under the above contract and since the price which you are now paying us and which we have proposed to be extended for the 5 year period beginning July 25, 1947, has been approved by the Federal Power Commission for sale to you and to other similar customers in the rate zone comprising our Jackson District, and which price has *in all other cases been extended by mutual agreement* with the respective buyers and copies of such agreements have heretofore been duly filed with the Commission, *we deem it to be useless as well as a waste of time, money and effort to resort to arbitration under the circumstances. Accordingly, we intend to continue in effect during said 5-year period beginning July 25, 1947, for all gas sold and delivered thereunder, the same price that is in effect on July 24, 1947.*"

3. The Contract between United and Willmut, on file with the Commission as Rate Schedule FPC No. 73, specifically provided that after July 25, 1947, the rate should be fixed by arbitration thus:

"VII. * * * The price to be paid by Buyer to Seller for each one thousand (1,000) cubic feet of gas sold and delivered to Buyer hereunder during each succeeding five (5) year period of this agreement, after July 25, 1947, shall be determined by agreement between the parties not less than twelve (12) months prior to the beginning of each of such five (5) year periods and failing so to agree the determination of the price shall be submitted to arbitration as hereinafter in this Section VII provided. * * *"

4. Under *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, supra, the Court encouraged definite contracts and dispensed largely with uniformity.

5. This question as to consent vel non under the Act is presently on review in Cause No. 13,683, Court of Appeals, District of Columbia, and the point has been decided in favor of Willmut.

6. In the Supreme Court of Mississippi, United said:

> "In a hit and miss fashion, Willmut brings up the alleged failure to arbitrate. Certainly Willmut well knows that this clause is inoperative not only before the Federal Power Commission but also with the Court. Machine Products Company v. Prarie Lodge, Miss. , 94 So. 2d. 344. Suggestion of Error Overruled, June 3, 1947."

With deference, this is a misciation for here there was a contract wherein the price might vary, but was to be fixed by appraisal. Compare *Hamilton* v. *Liverpool & L. & G. Ins. Co.*, 136 U.S. 242, 34 L. ed. 419, 10 S. Ct. 945, followed and applied in *Home Ins. Co.* v. *Watts*, Miss. , 91 So. 2d. 722, 725; and *M. T. Reed Const. Co.* v. *Virginia Metal Products Corp.*, CA 5, 213 F. 2d 337.

Here, United flatly denied this right to thus fix by agreement or appraisal the price. This was a contract violation and did not in any way give title to United to the excess over the lawful rate.

The effect of the agreement to fix the price for five-year periods by arbitration is directly drawn in issue and should be decided. There is a dispute on the merits hereasto between Willmut and United, but until jurisdiction is vouchsafed, no decisions may be.

We have noted with profound interest the argument presented by the Solicitor General on behalf of these gas companies in Causes Nos. 691, 694, and 695, October Term 1957. With the utmost deference, thereto we desire to make challenge, especially on behalf of this small distributor. The relationship between United and Willmut, as shown before the Commission, has been one of continued hostility and litigation. If there be one thing certain, it is that, circumstanced as Willmut was, it would not have vested in United the right to fix, as its agent before the Commission, the rate at which Willmut would be compelled to do business.

V.

There was a Violation of the Fourteenth Amendment, Both The Due Process and the Equal Protection Clauses.

There was a violation of the Fourteenth Amendment, both the Due Process and the Equal Protection Clauses, in a double aspect:

(1) Most disturbing is the divestiture by this opinion of all State jurisdiction quoad issues of this character. United assumed to strike down and did strike down all resort by local parties to local Courts for rectification of local wrongs, by compelling resort to Federal sovereignty, unduly thus burdening the Federal Power Commission and the Federal Courts; but more especially, those in Mississippi, who had local demands of the kind and character here under discussion; they could not go to the local Courts.

United propounded to the State Supreme Court as its prime postulate:

> "The interstate sale of gas to Willmut, a distributor, by United, a natural gas company, is under the exclusive jurisdiction of the Federal

> Power Commission; and neither the Federal Power Commission nor any Court can determine the lawfulness of past rates, or grant damages or reparations in connection therewith."

The State Court accepted it 100%, and excised from Mississippi's Constitution jurisdiction of that segment as to intrastate commerce and denied to Willmut the right to file in any local court of competent jurisdiction a complaint in words and figures as follows:

> "Willmut says that the gas whereasto recovery is herein sought was originated by United at the Gwinville field in Mississippi. Therefrom said gas moved from the well site through a pipe line to Point B on said appendix, in a 12-inch main, commingled with other Mississippi gas, there being in said main no extra-State gas whatsoever. At said Point B, said stream was severed into two segments; one of said segments entered through a separate valve, the 8-inch Hattiesburg-Jackson line, which had been severed at a point south of this point of entry and then moved northward in said 8-inch main to Point A at Jackson, unmingled with any gas having origin outside of Mississippi; and thence moved from said Point A to Philadelphia, Mississippi through a 6-inch main, which had been constructed by United after an application under the Natural Gas Act for a Certificate of Convenience and Necessity had been withdrawn, to the knowledge and with the consent of the Federal Power Commission. Said gas, wherefor demand is hereunder lawfully made, is that gas moving from this unmixed stream between Points A and B and there consumed in local distribution systems, wholly intrastate."

This form of complaint as to the North end was specifically submitted to the State Supreme Court as

being appropriate for the determination of Mississippi's Court. (Suggestion of Error, p. 17, It was denied. The same form substantially as to the South end was propounded to the State Court and the right to file each was specifically denied, save thereasto Mr. Justice Hall did dissent. In short, all litigation of this character was extirpated by Mississippi's decision consciously.

This decision is fundamentally contrary to all enactments of Congress limiting Federal jurisdiction. If it be that the State Court can thus expand it, there will be a period of uncertainty until final rectification, with untold wrong thus wrought. The fundamental right of a local citizen to try local questions in local courts has been fundamentally subverted.

(2) Assuming local jurisdiction, the rights of Willmut and its customers have been crucified. So as to preserve the One Million Dollars for Willmut and its customers, the exercise of the exclusive jurisdiction of this Court is as requisite as it was in *City of Detroit* v. *Murray Corporation*, supra.

In the Chancery Court the decree entered as to motions and demurrers was in favor of Willmut, leaving the facts as to intrastate gas against interstate gas wholly undetermined, Willmut suing exclusively for intrastate gas alone.

The State Court, after appropriately adjudging the Federal question, assumed to dismiss Willmut's suit on the merits, without having afforded Willmut any opportunity whatsoever to present to the Court any proof, basing its opinion upon want of jurisdiction—lack of power to decide. The sole predicate whereon the Court assumed therefor to rely were the exhibits

annexed to the motion of United, whereasto Willmut had no part—the Court assuming to say that there was no jurisdiction, which would mandatorily have required a dismissal for want of jurisdiction and not on the merits.

How Mississippi's Court could judicially know what Willmut had power to prove passes our comprehension. Under Section 146 of the *Constitution of Mississippi*, its jurisdiction was that of a court of appeals, bound by the record received, whereto no additional fact not therein appearing could be considered. It could not rely upon personal knowledge—speculation. Compare *Gillespie* v. *Doty*, 160 Miss. 684, 135 So. 211. As controlling, note that said by Mr. Justice Cardozo in *Shapleigh* v. *Mier*, 299 U.S. 468, 81 L. ed. 355, 113 A.L.R. 253, 257:

> "* * * judicial notice and judicial knowledge are far from being one. The law is not so vain as to make pretense of their identity. To the contrary, a court that is left without knowledge of a fact after exploring to the full every channel of information must needs decide against the litigant who counts upon the fact as an essential of his claim. De non apparentibus et de non existentibus eadem est ratio."

See also Annotation, "Distinction between judicial notice and judicial knowledge," 113 *A.L.R.* 258; 20 *Am. Jur.*, "Evidence," Sec. 21, p. 52; 31 *C.J.S.*, "Evidence", Sec. 11, p. 516.

The exclusive import of the State Court's opinion was that the Chancery Court was without jurisdiction, but assuming, arguendo, jurisdiction, it could not turn Willmut and its customers out of court as to whether

the gas was local or not without allowing them an opportunity to be heard.

In this connection, Willmut was not permitted to introduce any of the competent evidence showing the local Court's jurisdiction, including a collateral estoppel as to the unlawfulness of the exacted rate. The judgment in Mississippi's Court denying Willmut's recovery because of that which was assumed to be contained in an exhibit, which was not introduced in evidence—offered in evidence—and to which Willmut had no opportunity to object, constituted a condemnation without a hearing. Compare *National Union of Marine Cooks* v. *Arnold*, 348 U.S. 37, 99 L. ed. 46, approved in *Michel* v. *Louisiana*, 350 U.S. 91, 100 L. ed. 83, 94, applying the prior decision of *Hovey* v. *Elliott*, 167 U.S. 409, 42 L. ed. 215, 219.

That attempted by Mississippi's Court was to take from Willmut and its customers a property right upon a judicial speculation as to what would be introduced in evidence when and if the case were heard on the merits. There was no possibility of Mississippi's Court anticipating at this juncture when the plea, which was sustained, was on its face wholly inadequate to warrant any such awful consequences whereby the tort feasor took from those wronged the entire One Million Dollars, and the right of countless Mississippi citizens to resort to their local Courts, according to their local Constitution, for rectification of local wrongs; nay, more, the right to be heard at home as to that unlawfully there done; thereasto they might not be compelled to go to Washington for rectification.

Willmut did naught to lose its right to introduce its evidence and yet it is denied that hearing just as ef-

fectively as was done in the *Hovey* Case, supra, where there had been a refusal. This denial, where there has been no contempt, but a ready conformity by Willmut to every judicial requirement, raises even the more sharply the Federal question and vouchsafes the protection, for Willmut has not been heard. It was not until the opinion was herein rendered that there was any intimation that there would be a transgression of the Federal Constitution, but there was and has been; and, so being, the law is well settled that when the Federal questions are first raised in the appellate court, and before that date there was no opportunity to there as to assign them an assignment at that time is appropriate and proper. *Saunders* v. *Shaw*, 244 U.S. 317, 61 L. ed. 1163; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 74 L. ed. 1107; and *Fleming* v. *Fleming*, 264 U.S. 29, 68 L. ed. 547. Compare *Herndon* v. *State of Georgia*, 295 U.S. 441, 79 L. ed. 1530. Of course, as to the construction of the Act, the Federal question had been raised, but this further invasion did not occur until the rendition of this opinion.

Furthermore, where the opinion here, without any hearing from Willmut, assumed, contrary to the facts which Willmut can, with deference, produce, to deny by an absolute dismissal the right to a hearing, then in and of itself the opinion became and was a deprivation of property and a denial of the equal protection of the law.

That which Mississippi's Court in substance has done is to render a decree against Willmut and its customers that they take nothing on the merits in virtue of a pleading raising only a question of jurisdiction.

Our postulate is that having the burden of proving that there was intrastate gas, Willmut was entitled thereon to introduce all relevant evidence, but when, having won before the Chancellor, the Supreme Court assumed to say that there was no evidence in Willmut's possession that would demonstrate a right to recover without having given Willmut the right to introduce that which it had, the State Court's opinion became not a judicial decision, but a flagrant invasion of the Constitution, whereasto rectification is requisite here.

CONCLUSION

Willmut is a small Mississippi distributor of natural gas, dependent upon United, by contract, for its requirements until August, 1962; and its relations have been beclouded by litigation. Before determining to come to this Court by reason of the expense involved, the small Company had to count the cost and has so done; and has made, through its counsel, an examination of the subjects requisite to justify its action.

The questions are serious and far from simple, and the presentation has been as concise as was reasonably possible.

This Court is the sole tribunal wherethrough rectification may be thus wrought and it is respectfully submitted that certiorari should be granted because of the nature of the litigation and the fundamental questions presented.

This decision has already been broadcast as being "of interest and importance" in 249 F. 2d—No. 5, (Jan. 27, 1958), under "Judicial Highlights." Herein alone may the symmetry of the State-National system be preserved, and we dare to prophesy that unless this

Court takes the requisite "stitch in time", it will be called upon definitely for the "other nine".

It may be contended that Section 146 of *Mississippi's Constitution* as interpreted violates Petitioner's Constitutional rights, so as to authorize an appeal. If so, prayer therefor is hereby respectfully made.

Respectfully submitted,

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MAY 23, 1958.

APPENDIX I

IN THE SUPREME COURT OF MISSISSIPPI

No. 40,521

UNITED GAS PIPE LINE COMPANY

v.

WILLMUT GAS AND OIL COMPANY

GILLESPIE, *Justice:*

This suit was filed by Willmut Gas and Oil Company (Willmut), appellee, against United Gas Pipe Line Company (United), appellant, in the Chancery Court of Forrest County, Mississippi, for allegedly unjust, unlawful, excessive and discriminatory rates charged Willmut by United for natural gas sold and delivered for a six-year period ending June 20, 1953. The complainant prayed that the court "fix a just, reasonable, non-preferential and non-discriminatory rate for the intrastate gas delivered by United to complainant and award a decree to complainant for the difference between said sum so fixed and the amount actually paid by complainant."

Included in the answer of United was a motion to dismiss the original bill because the Federal Power Commission had full jurisdiction to regulate the rates involved and had assumed jurisdiction and adjudicated the questions. United also filed several pleas in bar. The motion to dismiss raised the question of whether the chancery court had any power or competence to hear and determine the question, and asserted that the fixing and regulation of the rates for the sale of natural gas involved was vested exclusively in the Federal Power Commission by the Natural Gas Act. Attached to the motion to dismiss and the pleas in bar were various proceedings had before the Federal Power Commission and the statement of facts next to be made is taken from these sources and from the bill of complaint.

Willmut moved to strike the motion to dismiss and demurred to the pleas in bar. A hearing was had on the pleadings and the court overruled the motion of United to dismiss the cause and sustained demurrers to United's pleas in bar. An interlocutory appeal was granted by a member of this Court to settle the principles of the case. There is no dispute as to the facts pertinent to our decision.

United is a natural-gas company within the meaning of the Natural Gas Act, and the Federal Power Commission issued to United a certificate of public convenience and necessity for the establishment of certain interstate pipelines for the transportation of natural gas. Its operation extended from Texas through Louisiana into Mississippi and other States to the east. Willmut is a franchised distributor of natural gas to consumers in East Jackson, Rankin County, Mississippi, and in Hattiesburg, Forrest County, Mississippi, and towns and communities lying between those places. Prior to August 19, 1943, Willmut owned an eight-inch pipeline from East Jackson to Hattiesburg, and on that date it was taking delivery of natural gas at East Jackson and transporting the gas in its own transmission line to its several distribution points. All of the gas purchased as of that date by Willmut from United was produced either in Texas or Louisiana. On August 19, 1943, the Federal Power Commission issued to United a certificate of public convenience and necessity under the authority of which United purchased from Willmut the eight-inch transmission line running from East Jackson to Hattiesburg. Willmut retained all of its local distribution franchises and systems.

On August 20, 1943, United and Willmut entered into a contract under which United agreed to sell, and Willmut agreed to purchase, a sufficient quantity of natural gas for the latter to supply its customers for a period of 20 years. The contract provided for a rate of 25¢ per mcf for the

first five years. Thereafter the rate was either to be agreed upon by the parties or fixed by arbitration. This contract was filed with the Federal Power Commission and accepted by the Commission as a rate schedule required by the Natural Gas Act. On January 8, 1947, United addressed a letter to Willmut stating that the matter of rates could not be submitted to arbitration because of the jurisdiction of the Federal Power Commission, and United stated that it intended to continue in effect the same price which was in effect on that date. This letter, and another whereby Willmut agreed to the 25¢ per mcf rate, was filed with and accepted by the Federal Power Commission as a rate schedule, and this has been the rate schedule on file with the Commission for the period involved in this suit.

On October 10, 1941, United contracted to deliver natural gas at Plant Eaton, located within one mile of Hattiesburg, of the same kind and quality as that sold and delivered to Willmut, at a rate of 11.5¢ per mcf. On August 5, 1947, United voluntarily put into effect a rate of 17.5¢ per mcf for natural gas of the same kind and quality as that sold and delivered to Willmut, for natural gas delivered to Mississippi Power & Light Company (now Mississippi Valley Gas Company) at Jackson, Mississippi, across Pearl River from East Jackson, Mississippi. These rates charged Plant Eaton and Mississippi Power & Light Company form the basis of the discrimination of which Willmut complains.

Until early in 1947, all of the natural gas sold and delivered to Willmut by United was transported from the States of Louisiana and Texas, and was therefore transported and sold in interstate commerce for resale. United's system included a network of pipelines in at least five states. Included in that system was the eight-inch transmission line running from East Jackson to Hattiesburg, formerly owned by Willmut, and another line running parallel thereto between East Jackson and Hattiesburg which was used in transporting natural gas to Mobile, Alabama. These two

parallel lines between East Jackson and Hattiesburg were connected in at least three places. There was a connection at or near East Jackson to United's Sterlington-Jackson eighteen-inch interstate line, the Jackson-Mobile sixteen-inch interstate line, a twelve-inch line from the Gwinville Gas Field located in Mississippi, and a ten-inch line running from near Collins, Mississippi to Bogalusa, Louisiana.

In the early part of the year 1947, United made certain system changes for the avowed purpose of restricting the passage and delivery to Willmut through the East Jackson-Hattiesburg line to intrastate gas. As a result of these changes, United effected a discontinuance of the flow of interstate gas into the East Jackson-Hattiesburg line, through which Willmut was served, except through the connecting link at or near the southern terminus. A relatively small amount of interstate gas flowed into the line serving Willmut after February 6, 1947. These system changes did not entirely discontinue the flow of interstate gas into the pipeline serving Willmut and a relatively small amount of interstate gas continued to commingle with locally produced gas into these pipelines. On seven occasions between February 6, 1947 and April 22, 1952, gas flowed from United's interstate lines into the East Jackson-Hattiesburg line—five times because of repairs on the latter line and on two other occasions for other reasons. At any time the pressure on the pipes from the Gwinville Field fell below the pressure on United's interstate line, interstate natural gas would flow into the pipelines supplying Willmut, and at all times there was some commingling of a relatively small amount of interstate gas with the locally produced gas supplied Willmut.

The system changes above referred to were made by United without approval of the Federal Power Commission as required under Section 7(b) of the Natural Gas Act (15 U.S.C.A., Sec. 717f(b)).

On March 16, 1948, Willmut filed with the Federal Power Commission an informal complaint, and a formal complaint on December 8, 1948. Therein Willmut invoked the jurisdiction of the Federal Power Commission and prayed for an order fixing a just and reasonable rate for natural gas sold and delivered by United to Willmut prior thereto and for the future and for an award for reparations for rates theretofore charged in excess of a just and reasonable rate. Willmut's complaint was, at its request, considered as an intervention in a general rate investgiation of United initiated by the Federal Power Commission. Later it was separately heard and determined.

In that proceeding, Willmut contended that all of the natural gas sold to it by United was subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act. After the hearing, the Federal Power Commission held that all the natural gas sold by United to Willmut was "in interstate commerce" so as to be subject to the provisions of the Natural Gas Act; that United had been charging Willmut a rate that was unjust, unreasonable, unduly discriminatory and preferential.

The Commission held that it did not have the power to award reparations for past discriminatory charges but that it did have power to make findings as to the lawfulness of past rates, but made no attempt to enforce its findings as to past rates. It is conceded that the Commission did not have the power to award reparations for excessive rates charged in the past. The Commission's order, entered June 1, 1953, required United to file a schedule of rates equal to those charged Mississippi Valley Company (17.5¢ per mcf.). It also required United to undo the system changes made in 1947 when United attempted to cut off from Willmut all but local gas. Neither party appealed from the Commission's order. The present suit was filed shortly after the Commission's order was entered.

It is contended by Willmut in the present suit that the court has power to award reparations for the excessive and discriminatory rates charged by United prior to the effective date of the Federal Power Commission's order requiring the rate to be reduced, but only as to that portion of the gas sold by United to Willmut which was produced, transported and sold in the State of Mississippi. Willmut concedes in its complaint in the present suit that because of the proceedings had before the Federal Power Commission, as to all interstate gas, the Court has no jurisdiction; but contends, in effect, that it can separate the intrastate gas from the interstate gas and recover in its common law action reparations for all excessive charges for intrastate gas made by Willmut prior to the reduction order by the Federal Power Commission.

Willmut states in its complaint that the suit is for the benefit of its customers, to whom it will refund the amount recovered after deducting all of its costs.

The Natural Gas Act defines a natural gas company as "(6) 'Natural-gas company' means a person *engaged* in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." There is no contention that United is not a natural gas company within the meaning of the Natural Gas Act.

Section 7(b) prohibits a natural gas company from abandoning any portion of its facilities subject to the jurisdiction of the Commission or any service rendered by means of such facilities without first obtaining the permission and approval of the Commission.

The provisions of the Natural Gas Act "shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or other use and to natural-gas companies engaged in such transportation or sale, but shall not apply to

any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." Sec. 1, Natural Gas Act.

Section 4 of the Natural Gas Act provides for the filing of schedules with the Federal Power Commission showing all rates and charges for any transportation or sale of natural gas subject to the jurisdiction of the Commission, and it is provided in Section 4(d) "unless the Commission otherwise orders, no change shall be made by any natural gas company in any such rate, charge, classification, or service . . . except after 30 days notice to the Commission and to the public."

Section 5 of the Natural Gas Act vests jurisdiction in the Federal Power Commission to determine just and reasonable rates "to be thereafter observed and enforced."

Under the rule-making power vested in the Commission by the Act, the Commission adopted the following rule: "No natural-gas company shall directly or indirectly demand, collect, or receive, for the transportation or sale of natural gas subject to the jurisdiction of the commission, or for the lease or utilization of any facilities subject to the jurisdiction of the Commission, any rate or charge different from that prescribed in its rate schedule or schedules actually on file with the commission, unless the commission shall, for good cause shown otherwise provided by order."

The first question for our decision is whether the Federal Power Commission had power to regulate the rates charged by United for natural gas sold Willmut, both as to that locally produced as well as that transported into the State.

United operated a unified system enterprise which was interstate in character. The pipeline employed to serve Willmut with natural gas was an integral part of United's interconnected interstate system, all of which was duly certificated by the Federal Power Commission. The un-

authorized system changes made by United in 1947, which largely, but not entirely, restricted the flow of natural gas to Willmut to local gas produced at the Gwinville Field, was ineffectual insofar as the jurisdiction of the Federal Power Commission was concerned. In addition to the fact that some interstate gas continued to commingle with the local gas supplied Willmut, the natural gas transported from without the State was available at all times to completely or partially supply the natural gas requirements of Willmut when the locally produced gas became for any reason unavailable or insufficient; and the pipes were so connected that such flow of interstate gas would automatically take place. There was but one sale by United to Willmut under one contract covering all gas sold and delivered at one price schedule which was on file with the Federal Power Commission. The commingled natural gas thus sold and delivered to Willmut was "in interstate commerce" subject to the regulating power of the Federal Power Commission. Pennsylvania Water & Power Co. v. Federal Power Commission, 343 U.S. 414, 96 L.Ed. 1042, 72 S.Ct. 843; Connecticut Light & Power Co. v. Federal Power Commission, 324 U.S. 515, 89 L.Ed. 1150, 65 S.Ct. 749; Wisconsin-Michigan Power Co. v. Federal Power Commission, 197 F. 2d 472 (CCA 7). And at Willmut's request the Federal Power Commission did assert its power over the entire sale of natural gas to Willmut.

The second question is whether Willmut can maintain a common law action for the recovery of the difference between the discriminatory rate charged by United and a just and reasonable and non-discriminatory rate for that part of the natural gas sold which was produced, transported and sold in the State of Mississippi. Willmut contends that since the Federal Power Commission had no power to award reparations for past charges, and could only require United to file a rate schedule thereafter to be charged, that the sovereignty of the State to apply its com-

mon law and award reparations was not abrogated by the Natural Gas Act. In effect, Willmut contends that the matter of reparations was a field left open by Congress when it failed to give the Federal Power Commission power to award reparations for past charges.

We have concluded that all of the natural gas sold Willmut was subject to the jurisdiction of the Federal Power Commission; thus it was all "in interstate commerce" as far as this second question is concerned. The problem is whether it is open for the courts to determine what the reasonable rates during the period prior to the Federal Power Commission's order should have been. The Supreme Court of the United States said in Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 95 L. Ed. 912, 341 U.S. 246;

"Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

"We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable."

The power of the Federal Power Commission to regulate the price paid for natural gas transported and sold for resale in interstate commerce is exclusive, and such price is not subject to state regulation. Natural Gas Pipeline Co. of America v. Panoma Corp., et al., 99 L. Ed. 866, 349 U.S. 44. In Mississippi Power & Light Company v. Mem-

phis Natural Gas Co., 162 F. 2d 388 (CCA 5), Mississippi was entitled under its contract with Memphis to a reduction in rates. But Mississippi did not request the Federal Power Commission to require Memphis to file a new rate schedule to operate prospectively. Thereafter Mississippi filed suit to recover on its contract. It was held that under the Natural Gas Act rate making is a legislative function vested by Congress in the Federal Power Commission, and that to give effect to the clause in the contract reducing the rate as to past charges would operate to transfer the legislative function of rate making from the Commission to the courts. In denying the right of Mississippi to recover, the Court held that the contract clause (entitling Mississippi to a reduced rate) became inoperative after passage of the Natural Gas Act. The effect of the decision in the Mississippi case is that the rate schedule on file with the Federal Power Commission is the only lawful rate insofar as past rates are concerned. Cf. Glassburg v. Boyd, 116 Atl. 2d 711.

When a sale of natural gas is subject to the power of the Federal Power Commission, or when the Commission exercises its power in a case where it has discretion, (cf. Conn. Power & Light Co. v. Federal Power Commission, supra) its jurisdiction is full and exclusive. It is not for a court to say whether Congress gave the Federal Power Commission too much or too little power over the subject of rate regulation, or whether the remedy afforded a party in a given case is complete or inadequate, measured by judicial standards.

The jurisdiction of the Federal Power Commission having attached to all natural gas sold to Willmut, there is no residual jurisdiction for independent court action. The local component lost its intrastate character and there remained no power in the courts to apply the common law of the State.

The chancery court erred in not sustaining the motion to dismiss the bill for want of jurisdiction to determine the issues presented, and its order is therefore reversed. On interlocutory appeal we ordinarily remand the case to the trial court, but in this case no additional or amended pleading could enable Willmut to maintain its suit. It would serve no purpose to remand the cause, and final judgment will be rendered here dismissing the bill. Parker v. Board of Supervisors, 125 Miss. 617, 88 So. 172.

Reversed and Bill Dismissed.

All Justices Concur.

APPENDIX II

IN THE SUPREME COURT OF MISSISSIPPI

No. 40,521

UNITED GAS PIPE LINE COMPANY

v.

WILLMUT GAS & OIL COMPANY

On Suggestion of Error

HALL, *Justice*, Dissenting:

The suggestion of error in this case is directed solely to the action of the Court in entering a final judgment, which point is covered only in the last paragraph of the opinion originally entered herein which has been reported in 97 So. 2d 530, 536, and I respectfully dissent from the action of the Court in overruling the suggestion of error.

It must be remembered that the lower court decided this case on a motion filed by United to dismiss the bill, which motion was overruled, and this Court reversed that action holding that the motion should have been sustained, but the Court went further and instead of remanding the cause, it rendered a final judgment without giving Willmut

an opportunity to amend its bill in an effort to obviate the holding of this Court. The case was never tried on the merits and the result is that this Court has entered a final judgment against the original complainant without any hearing on the merits. This is contrary to every concept of fairness and justice and contrary to what this Court said in the case of Ascher & Baxter v. Moyse & Company, 101 Miss. 36, 56, 57 So. 299:

"The lower court declined to enter into a consideration of the merits, but dismissed the bill solely upon the ground that the complainants did not have the right to sue, upon the idea that the provisions of the Code of 1906 were repealed by the act of 1908. This court is strictly a court of review, and it is only in rare instances where the court will consider the merits of any controversy, unless passed upon in the lower court. Thompson v. Bank, 85 Miss. 261, 37 South, 645; Edwards v. Lumber Co., 92 Miss. 598, 46 South 69. A moment's reflection will at once demonstrate the soundness of this rule. The parties to any litigation have the right to have matters of fact submitted to and passed upon by the jury or the chancellor, in whatever forum the cause is being tried, and the finding of facts in the court below by the proper authority will not be disturbed in this court unless it is manifestly wrong. The opportunities afforded to the lower court are so much better for the correct conclusions and findings upon all questions of fact than in this court. Here we have nothing but the naked record before us; there, in most cases, the parties themselves are in the presence of the court and testifying. The manner of testifying, and their appearance upon the witness stand, and many other things, are influential in determining the triers of fact."

The holding of the majority is also contrary to what was said in Town of Utica v. State, ex rel. Rice, Attorney General, 166 Miss. 565, 579, 148 So. 635, on suggestion of error as follows: "On a former day of this term the judg-

ment of the court below in this cause was reversed, and the cause was remanded to the circuit court for trial de novo. The appellant now suggests that upon reversal of the judgment of the circuit court a final judgment in its favor should have been entered in this court. This exact point was recently decided adversely to appellant's contention in the case of McIntosh v. Munson Road Machinery Co. (Miss.), 145 So. 731; and consequently the suggestion of error, or motion to correct the judgment as it is erroneously styled, must be overruled."

It is also contrary to what was said by Judge Griffith in the case of Brock, State Bank Commissioner v. Adler, 180 Miss. 126, 128, 178 So. 593, as follows: "Much as we sympathize with appellee as a result of the decision in Adler v. Interstate Trust & Banking Co., 166 Miss. 215, 146 So. 167, 87 A.L.R. 347, followed in the opinion delivered on December 13, 1937, 177 So. 523, we are bound to hold now that the controversy is at an end on its merits. We remanded the case that the trial court might adjudicate the damages on the injunction. Appellant now appears and expressly waives any claim for damages; and upon that basis a final decree will be entered here for appellant —but expressly disallowing damages for the wrongful issuance of the writ of injunction. Otherwise we could not enter any final decree as appellant has requested us to do."

Willmut proposes certain allegations which it might make in the amendment which it desires to make and sets out these allegations in detail at pp. 17, 43 and 44, of its suggestion of error. There are many thousands of people indirectly interested in this case and over a million dollars is sued for, and I feel that in view of the number of people involved and the amount involved Willmut is entitled to its day in court and should not be kicked out on a final judgment based upon the pleadings.

APPENDIX III

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Dale E. Doty, Claude L. Draper, Nelson Lee Smith and Harrington Wimberly.

Opinion No. 252

Docket No. G-1158

In the Matter of

Willmut Gas & Oil Company, *et al*

v.

United Gas Pipe Line Company

Opinion and Order Modifying and Affirming as Modified Decision of Presiding Examiner

APPEARANCES

For Willmut Gas & Oil Company

Garner W. Green, Sr., Esq.
Garner W. Green, Jr., Esq.
James Simrall, Jr., Esq.

For City of Hattiesburg, Mississippi

Honorable Edward J. Currie, Mayor

For United Gas Pipe Line Company

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For the Staff of the Federal Power Commission

Louis L. Da Pra, Esq.

Opinion

This matter is before the Commission on appeal from the initial decision of the Presiding Examiner.

Subject to review by the Commission, the Examiner found that United Gas Pipe Line Company (United) by its failure to make natural gas available to Willmut Gas & Oil Company (Willmut) at the same rates or charges voluntarily established and made available to Mississippi Valley Gas Company (MVG) and its predecessor, Mississippi Power & Light Company (MPL), is subjecting Willmut to undue prejudice and disadvantage, and is granting undue preference and advantage to MVG, and that such practices by United are unjust, unreasonable, unduly discriminatory and preferential, and unlawful, in violation of the provisions of the Natural Gas Act (Act). Accordingly, he directed United to file rate schedules for all sales of natural gas by United to Willmut containing rates and charges based on the rates and charges contained in United's Rate Schedule FPC No. 95, as supplemented, which became effective on July 26, 1947 (6 FPC 982),[1] and under which gas was sold to MPL and is now sold to MVG. Also, the Examiner denied United's motion to dismiss the complaint filed herein by Willmut and City of Hattiesburg, Mississippi (Hattiesburg).

The proceeding was initiated by the filing of the complaint by Willmut and Hattiesburg under Section 4(b) and 5(a) of the Act against United. Among other things, Willmut and Hattiesburg alleged therein that the contract rates at which United sells natural gas to Willmut are unjust and unreasonable and, in addition, unduly discrimi-

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[1] Official notice is taken that the rate schedule has been superseded by Rate Schedules DC 3J, G 3J, IND 1J and IN 1-2J set forth in United's FPC Gas Tariff, Original Volume No. 1, which rate schedules, among others, were permitted to become effective as of August 3, 1952. The contract, which was Rate Schedule FPC No. 95, has been retained as a service agreement under the tariff, pursuant to the applicable provisions of the Commission's Regulations under the Act.

natory and preferential. Complainants prayed, among other things, that the Commission fix just, reasonable, nondiscriminatory and nonpreferential rates for gas delivered by United to Willmut during the period January 1, 1940, "until final hearing", award reparations accordingly, and fix for the future a rate at which Willmut may purchase gas from United. In its answer, United moved that the complaint be dismissed on the grounds that, with the exception of deliveries made in East Jackson, Mississippi, "the natural gas delivered and sold to Willmut has been and is now wholly produced, transported and consumed within the Sate of Mississippi" and hence beyond the reach of the Act. In addition, United denied the alleged discrimination; asserted that its return is less than a just and reasonable return and that its deficiency in earnings will increase in subsequent years; and contended that the Commission is without authority under the Act to award reparations.

A public hearing upon the complaint and answer was held in May, 1952, and after the filing of briefs and oral argument before the Examiner, the initial decision was served upon the parties. Exceptions thereto were filed by United, Willmut, and counsel for the Staff of the Commission. Thereafter, oral argument was heard by the Commission on the matters and issues raised by the exceptions.

Together with its numerous exceptions, United filed a motion requesting the Commission (1) to cancel and set aside the decision, (2) to remove the Examiner in this matter, appoint another Examiner to consider the record and determine the issues involved, or (3), in the alternative, to omit the intermediate decision procedure and decision and set this matter for argument to and decision by the Commission. Also United requested that, if the motion is not granted, the matters submitted in support thereof be treated as an exception to the decision.

Motion To Cancel The Initial Decision

We consider first United's motion to cancel the decision and for other relief. Patently, the Commission may not properly entertain a motion for the omission of the intermediate decision procedure at a time subsequent to the rendition of the initial decision. In the first place, the motion is not timely within the purview of Section 1.30(c)(3) of the Commission's Rules of Practice and Procedure. Moreover, no useful purpose would be served by the waiver of the initial decision procedure under these circumstances. The motion to cancel and set aside the initial decision is subject to similar defects. Under Section 8(a) of the Administrative Procedure Act as implemented by Section 1.30(d)(3) of our Rules, the initial decision, in the absence of either an appeal to the Commission or review upon our motion within the time provided by the Rules, without further proceeding then becomes our final decision. Where, as here, exceptions to the initial decision have been timely filed, Section 8(a) of the Administrative Procedure Act makes it clear that we have all the powers we would have in making the initial decision. We retain complete freedom of decision as though we had heard the evidence ourselves. To that end, we may affirm, modify, or set aside the initial decision in whole or in part. Orderly procedure obviously requires that United, if it deems itself adversely affected by the initial decision, seek redress through exceptions filed pursuant to Section 1.31 of the Rules.

We find no warrant whatever in the record for United's request for the removal of the Examiner or for its charge that the decision is "infected with bias and prejudice." Preliminarily, we note that United does not allege that it has not had a full, fair, and impartial hearing. Nor does it allege that the Examiner displayed personal bias or prejudice, either against United or in favor of the opposite party, during the hearing by reason of which the Examiner

is unable to exercise impartially his functions in the case. It may be presumed that, if such personal bias or prejudice had occurred, United would have filed a timely and sufficient affidavit pursuant to Section 7 of the Administrative Procedure Act for the Examiner's disqualification. It may correspondingly be presumed that United would not have requested, as it did, oral argument before the Examiner. The sequence of events suggests that this belated and unfounded charge stems merely from United's dissatisfaction with the result reached by the Examiner.

We are satisfied that all parties were afforded a full and fair hearing. We specifically find, upon careful consideration of the entire record, that the Examiner conducted the hearing in a strictly impartial manner and wholly in accord with all the requirements of fundamental law as well as the Administrative Procedure Act. Likewise, an objective reading of the decision discloses that it is free of bias and prejudice. In view of the foregoing, the motion of United should be denied as hereinafter ordered

The Issues

We turn next to a consideration of the exceptions filed. In the main, they pose the same issues previously raised in the proceeding and which have been fairly and fully stated by Examiner. First, is United's sale of natural gas to Willmut "in interstate commerce" so as to be subject to regulation under the Act? Second, is United unduly discriminating against Willmut by charging MPL (now MVG) a rate of 17.5¢ per Mcf for domestic gas while at the same time exacting a 25¢ rate for such gas from Willmut? Third, does the Commission have power to award reparations? Fourth, does the Commission have the power to make findings as to the lawfulness of past rates? These, we shall treat in the order stated.

The facts are largely without dispute. The Examiner has included in the decision a full and fair statement of

the relevant facts involved. We shall allude from time to time to the facts to the extent necessary to pass upon the exceptions.

United is a "natural-gas company" within the meaning of the Act. It is engaged in the transportation and sale for resale of natural gas in interstate commerce. It transports by means of its integrated pipe-line system natural gas produced from fields in Texas, Louisiana, and Mississippi and delivers and sells it to industrials, other pipelines, and distribution companies, including Willmut, in the foregoing States and also in Alabama and Florida. It is a holder of numerous certificates of public convenience and necessity granted by the Commission under the terms of Section 7 of the Act authorizing those activities subject to regulation by the Commission. One of the certificates, granted at Docket No. G-478 in 1943 (3 F.P.C. 551), authorized United to acquire from Willmut and operate the Jackson-Hattiesburg line as an integral part of its natural-gas pipe-line system.

Jurisdiction

The jurisdictional dispute here is whether United's sale to Willmut is now and has been since February 6, 1947, regulable by the Commission. The Examiner found that the sale is not removed from our jurisdiction by the circumstances under which it is now made. Firstly, the Examiner found that United made certain system operational changes without the permission of the Commission required by Section 7(b), and, therefore, has failed to remove itself from regulation under the Act. Secondly, he held that the relatively small amount of interstate gas involved since that date is no bar to Commission regulation. Thirdly, he pointed out that the present plan of operation for the Jackson-Hattiesburg line shows that it is not to be regarded as an isolated segment, separate and distinct from United's transmission network, but rather as an integral

part of such network. For all these reasons, he concluded the Commission is empowered to regulate the rate for the Willmut sale.

United concedes that, until February 6, 1947, the sale made to Willmut from the Jackson-Hattiesburg line was regulable by the Commission. It challenges the jurisdiction of the Commission since that date. Its challenge is predicated upon an assertion that the gas transported through the Jackson-Hattiesburg line is produced, transported, and sold within the State of Mississippi, and the contention that the system operational changes made by United do not constitute an abandonment of service or facilities within the meaning of Section 7(b). We do not agree. We find no support for the contention, either in the plain words of the statute or in its legislative history.

Prior to February 6, 1947, United delivered and sold to Willmut natural gas produced primarily from fields in Texas and Louisiana and brought into Mississippi and to Willmut by means of United's certificated Sterlington-Jackson 18-inch, Jackson-Mobile 16-inch, Bogalusa 10-inch, and the Jackson-Hattiesburg 8-inch pipe lines. In 1947, United commenced to take gas from the Gwinville Field, which is located in Mississippi midway between Jackson and Hattiesburg, over a certificated 12-inch pipe extending easterly from the field to the Jackson-Hattiesburg and Jackson-Mobile lines, which run parallel to each other. The Gwinville tie-line was certificated in 1946 at Docket No. G-724 (5 FPC 628).

The following are the system operational changes made by United for the avowed purpose of restricting the passage to Willmut through the Hattiesburg-Jackson line of intrastate gas only, for which changes it neither sought nor obtained Commission approval: It caused check valves to be installed and so locked as to obstruct the flow of interstate gas from the Jackson-Mobile line to the Jackson-Hattiesburg line by the means of the then newly-constructed

Gwinville tie-line. It inserted a solid steel blind plate in the orifice flange of the meter station at the connection of the Bogalusa and Jackson-Hattiesburg lines, preventing thereby the passage to Willmut of gas from southeastern Louisiana. It severed and removed the connection between the Jackson-Hattiesburg line and Jackson compressor station, preventing the flow to Willmut of gas purchased in Texas and Louisiana and transported to it by means of the Sterlington-Jackson and Jackson-Mobile lines. It further severed and removed the connection between the Jackson-Hattiesburg and the Sterlington-Jackson lines at a point a few miles west of the Jackson compressor station, which was used when Willmut first commenced to take interstate gas from United in 1940. When United acquired the Jackson-Hattiesburg line in 1943 and installed the connecting link with the Jackson-Mobile line near the compressor station, the connection was used for emergency purposes until its severance. As a result of the foregoing installations, severances, and removals, all accomplished without the permission of the Commission first had and obtained, United effected a discontinuance of the flow of interstate gas from the Jackson-Mobile line into the Jackson-Hattiesburg line except through the connecting link at or near the southern terminus of the latter line. Only a relatively small amount of interstate gas has flowed into such line through the link since February 6, 1947.

We hold that by its removal of segments of pipe lines operated under certificates of public convenience and necessity United has physically abandoned facilities within the meaning of the plain words of Section 7(b). The section prohibits a natural-gas company from abandoning "all or *any* portion of its *facilities* subject to the jurisdiction of the Commission." Unquestionably the segments of pipe lines are "facilities" within the meaning of the section. There can be no doubt that these segments, at the time of their severance and removal, were "subject to the jurisdiction of the Commission" within the meaning of

the section. These conclusions are fortified by the legislative history of Section 7(b), particularly the failure of adoption of an industry amendment designed to give natural-gas companies "the right to make temporary abandonments, changes in equipment, substitution of pipe lines, and short-distances and loops" without the consent of the Commission under Section 7(b) where no effect on service would result (House Hearings on H. R. 4008, 75th Cong., 1st Sess., p. 127). Failure of United to secure permission for the foregoing severances and removals in the face of the mandatory provisions of Section 7(b) precludes it from validly asserting that it has negated the Commission's jurisdiction over the Willmut sale.

We further hold that United's discontinuance of interstate natural-gas service rendered to Willmut by means of certificated facilities, including those which it removed or which it disabled from performing the operations for which certificates were issued, by the installation of check valves, a blind plate, and other contrivances, is an abandonment of service within the meaning of the plain words of Section 7(b). And this conclusion is not affected by the incidental fact that United has replaced that service by intrastate service in a manner satisfactory to it. For Section 7(b) also prohibits a natural-gas company from abandoning "any service rendered by means of" facilities subject to the Commission's jurisdiction.

But for the foregoing installations, severances, and removals, United today would undoubtedly be rendering interstate service to Willmut in accordance with the terms and provisions of its certificate at Docket No. G-478. Plainly, United has abandoned interstate service to Willmut almost completely. A reduction in interstate service by the installation of controls being an abandonment of service within the meaning of Section 7(b), as the United States Court of Appeals for the Sixth Circuit said in *Panhandle Eastern Pipe Line Company* v. *Michigan Consolidated Gas Company*, 177 F. 2d 942, 945, *a fortiori*, an almost complete cessation of interstate service is an abandonment.

This principle is equally true whether the abandonment is effected by a severance of facilities or by manipulation of valves.

The legislative history of Section 7(b) includes a recognition that one of the purposes of the section was to forbid a company, once embarked upon interstate operation, to change its mind and become an intrastate operator except after proceedings contemplated by the section. (House Hearings on H. R. 5423, 74th Cong., 1st Sess. pp. 437, 438).

Whatever freedom United may have had prior to the passage of the Act to switch from interstate to intrastate service vanished when it became subject to regulation by this Commission and when it applied for and received certificates of public convenience and necessity under which it transported and sold gas in interstate commerce and used therefor facilities subject to the jurisdiction of the Commission.

An examination of the duties voluntarily undertaken by United when it initiated operations authorized by certificates of public convenience and necessity further fortifies this conclusion. Whatever its duties may have been prior to operations under the G-478 certificate, it is amply clear that, once United acquired the Jackson-Hattiesburg line from Willmut and commenced operating it as an integral part of its transmission network, there was impressed upon United the duty to use those facilities for the transportation and sale of natural gas in interstate commerce in the manner specified in the certificate. This is of course a continuing responsibility until proper authorization for abandonment is obtained. And it is a corollary of United's acceptance and enjoyment of the privileges granted by the Commission under the Act.

Effective administration of the provisions of the Act requires that the Commission insist on proper discharge of those duties. If departure therefrom becomes neces-

sary, United may so show as required by Section 7(b). Otherwise, the fundamental purpose of the Act to protect ultimate consumers served by certificated facilities is frustrated.

Under the provisions of Section 7(b) a natural-gas company may apply to the Commission for permission to abandon facilities or service subject to its jurisdiction. After due hearing, the Commission may grant such permission but only if it finds that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience and necessity permit such abandonment. Here, instead of following the prescribed procedure, United wrongfully arrogated unto itself the basic decision. (Cf. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U. S. 423-24). As was said by the Kansas Supreme Court in *State* v. *Missouri, K. & T. R. Co.*, 232 P. 1038, 1039 (1925) "in no event may public utilities arrogate the right to determine for themselves the functions and powers conferred upon the Commission." Nor does the failure of United to secure permission for the abandonment of interstate, even though it substituted intrastate, natural-gas service nullify the Commission's jurisdiction over the Willmut sale.

United seeks support for its position from language *In the Matter of The Connection Light and Power Company*, Docket No. IT-5665, 6 FPC 104 (1947). But there, prior to the effective date of the Federal Power Act, the company, for the avowed purpose of avoiding anticipated federal regulation, severed interstate connections and discontinued its one interstate sale for resale. Here, United, after the effective date of the Natural Gas Act, submitted itself to regulation thereunder.

Secondly, the Federal Power Act does not contain the certificate provisions found in the Natural Gas Act. More specifically, it contains no section similar to Section 7(b).

United concedes that it made the system operational changes without filing a "formal petition" for abandonment. But it argues that it "formally" advised the Commission of these changes by its letter of September 10, 1946, filed at Docket No. G-708. United seems to think the letter sanctioned the system rearrangements. The claim is palpably invalid.

It is predicated upon the following circumstances: Early in 1946 United filed an application for a certificate at Docket No. G-708 authorizing the extension of the Jackson-Hattiesburg line from the Jackson compressor station to Philadelphia, Mississippi. Subsequently, United filed a motion to withdraw the application for the reason it had concluded that the communities along the Philadelphia extension would be served with Mississippi gas. It said in its motion that before commencing construction it would advise the Commission how the aforesaid service would be provided. After the application had been permitted to be withdrawn, United transmitted to the Commission the letter of September 10.

It is to be observed that nowhere in the letter did United state that it proposed to sever the G-478 facilities. Nor did it mention a proposal to seal off the flow of interstate gas from the Bogalusa line. No mention was made that it proposed to sever the Sterlington-Jackson line from the Jackson-Hattiesburg line at a point a few miles west of the compressor station. The letter stated that the Philadelphia extension would be connected to the Jackson-Hattiesburg line at the Jackson compressor station. The changes referred to were characterized by United as "minor construction changes." In conclusion, United said that after such construction "it will be physically impossible for any interstate natural gas to move through the proposed 6-inch line extending to Philadelphia." No suggestion was made that Willmut would not be served with interstate gas. In fact, no mention is made at all of service to Willmut.

In any event, it is clear that United did not in that letter seek Commission approval for the acts described therein. Nor might it or was it construed to be an application under Section 7(b) for permission to abandon. Furthermore, there is a fatal absence of the hearing and findings mandatory under that section. As we said in 1942 *In the Matter of United Gas Pipe Line Company*, Docket No. G-216, 3 FPC 3, at page 9:

> * * * nor would United be justified in assuming that, in the face of the mandatory provisions of section 7(b) of the Act, either (a) the *facilities*, or (b) the *service* rendered by means of such facilities could be abandoned in the absence of the approval of the Commission, after a hearing or hearings, and the production of requisite evidence justifying the finding or findings prescribed by said section. *Seaboard Air Line Railway Receivers' Proposed Abandonment*, 202 I.C.C. 543, 553.

The case of *In the Matter of United Gas Pipe Line Company*, Docket No. G-556, 7 FPC 646 (1948) cited by United is not in point. There, we merely dismissed United's application for a certificate upon motion by United. In contrast to the situation here, United had not there embarked upon the transportation and sale of natural gas in interstate commerce pursuant to a certificate issued after due notice and hearing.

Turning to another point, United misreads into the Examiner's decision a purpose to extend the jurisdiction of the Commission to the production and gathering of natural gas contrary to Section 1(b). No such inference can be reasonably drawn from the decision. The Examiner deals with facilities used in the transportation of natural gas in interstate commerce and the sale of natural gas to Willmut in interstate commerce for resale for ultimate public consumption. Those activities are clearly within the ambit of the Commission's jurisdiction expressly

granted by the Act. And that grant is of course not nullified by United's wrongful acts.

United excepts to the finding of the Examiner that the small amount of natural gas which has flowed into the Jackson-Hattiesburg line from the Jackson-Mobile line since February 6, 1947 is no bar to federal regulation.

As we have seen, United conceded that the sale to Willmut was one "in interstate commerce" for resale and subject to regulation prior to that date. The circumstance that only a relatively small amount of gas has moved in the line since then is a direct consequence of the system rearrangements made by United without the permission required by Section 7(b). The Commission's plenary jurisdiction over the Willmut sale is unaffected by those unauthorized syste n rearrangements. The quantity of interstate gas delivered under presently existing conditions is therefore immaterial. In any event, as *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U. S. 414, cited by the Examiner, holds, federal rate authority applies to all electricity sold despite the fact that it is made up of interstate energy, together with that locally produced.

We turn next to Staff counsel's exception to the Examiner's failure to require United to restore the facilities so that full interstate service to Willmut may be resumed. The contention is made that there is ample authority within the framework of the Act for the Commission so to order. Counsel points to the Examiner's assertion that United's unauthorized rearrangement of its system operations may be corrected by order of the Commission directing the establishment of system operations existing prior to February 6, 1947. The Examiner stated that power to take such action is granted by the provisions of Section 16 of Act authorizing the Commission to perform any act and to issue any order which it may find necessary or appropriate to carry out the provisions of the Act. It is plain, however, that Section 16 does not grant the Commission

any power to issue an order which does not have its genesis elsewhere in the Act (Cf. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, 337 U.S. 498, 508).

Turning to the Act we find that Sections 4(b) and 5(a) grant the Commission power to regulate interstate service (*Michigan-Consolidated Gas Company* v. *Panhandle Eastern Pipe Line Company*, 173 F. 2d 784, 789). Section 7(e) grants the Commission power to issue certificates of public convenience and necessity to any qualified applicant therefor, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder; and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity. That section also grants the Commission power to attach terms and conditions to the issuance of the certificate and to the exercise of the rights granted thereunder. Section 7(b), as we have seen, prohibits the abandonment of interstate facilities or service. And this prohibition plainly requires a continuation of service until abandonment is authorized. Finally Section 16, authorizes the Commission to do all acts reasonably necessary and fairly appropriate to make the grant of these powers, which Congress has expressly conferred upon the Commission, fully efficacious (*Colorado Interstate Gas Company* v. *Federal Power Commission*, 142 F. 2d 943, 952). Otherwise, these provisions, which are integral parts of the broad and comprehensive scheme provided by the Act for the regulation of the wholesale distribution to public service companies of gas moving in interstate commerce, would be deprived of significant meaning.

It must also be remembered that when the Commission granted United the G-478 certificate, it found that the

acquisition and operation proposed was required by the public convenience and necessity. Also, the Commission found that United was "able and willing" properly to do the acts and perform the service proposed, and to conform to the provisions of the Act and the regulations of the Commission. By its initiation of service authorized by the certificate United undertook the duty of continuing to perform the service and of satisfying the demands of the public convenience and necessity. And until and unless a satisfactory showing is made pursuant to the provisions of Section 7(b) that the available supply of natural gas is depleted to the extent that the continuance of such service is unwarranted, or that the present or future public convenience and necessity permit United to lay aside that obligation so voluntarily assumed, that duty must continue to be discharged.

Against the background of the particular grant of powers noted and the duties voluntarily assumed by United when it initiated service under the G-478 certificate, Section 16, as a necessary corollary, authorizes the Commission to order restoration of the certificated facilities and the resumption of the certificated service which United abandoned without the approval of the Commission.

It may be noted that the evidence shows that the facilities may be restored in a matter of hours. Also, as one of the largest natural-gas companies, United would presumably have no financial difficulties in making such restoration.

In view of all of the foregoing, we shall require United to restore the certificated facilities and interstate service abandonment of which has never been authorized, as hereinafter ordered.

Discrimination

After careful consideration of the entire record, we find no reason to depart from the Examiner's finding that, by its failure without lawful justification to make natural gas

available to Willmut at the same rates or charges voluntarily established and made available to MVG and its predecessor, MPL, United is unlawfully subjecting Willmut to undue prejudice and disadvantage; and unlawfully granting undue preference and advantage to MVG; and that such practices by United are unjust, unreasonable, unduly discriminatory and preferential, and unlawful, in violation of the provisions of the Act. The evidence conclusively demonstrates that United is unduly discriminating against Willmut by charging MPL (now MVG) a rate of 17.5¢ per Mcf for domestic gas under its Rate Schedule FPC No. 95 while at the same time exacting a 25¢ rate for such gas from Willmut under its Rate Schedule FPC No. 73.[2]

In passing, we note that the Examiner has not, as United contends, misrepresented the contentions of Willmut and Hattiesburg. Plainly, this part of the proceeding is a "discrimination case." Complainants plead undue discrimination. Alleged discrimination has been denied by United. And we are satisfied that undue discrimination has been shown to exist.

Numerous of United's rate schedules in the Jackson rate zone are of record. The Jackson rate zone embraces the territory from the Mississippi River east to Pensacola, Florida, but excluding the New Orleans area. It includes Jackson, Mississippi; Mobile, Alabama; and Pensacola, Florida. The city-gate rates prescribed in such schedules are applicable to the sale and delivery of natural gas for resale for domestic and commercial use only. With respect to the sale for resale of gas for industrial use, the evidence shows that United customarily entered into certain percentage arrangements with each distributor. We are concerned here with the discrimination shown in the rates for

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[2] Official notice is also taken that in 1952 United filed a proposed notice of cancellation of that portion of this rate schedule relating to the sale of natural gas to Willmut except at East Jackson. The proposed notice was suspended, along with other matters, at Docket No. G-2019 by order of the Commission issued August 1, 1952.

resale of gas for domestic purposes between Willmut and MVG. Such gas will be identified here as "domestic gas".

An unreasonable difference in rates for domestic gas under substantially similar conditions of service has been shown. Willmut and MVG are both located in United's Jackson rate zone, "a stone's throw" from each other. For many years, United extended a uniform rate for domestic gas to all customers in the zone. In 1947, it extended a lower rate to MPL for such gas. Discovery of gas in Mississippi was given as the reason for the change, but in fact MPL and later MVG at all times here in question have been served with interstate gas. At the time of the change, United recognized that the rate voluntarily extended to MPL was lower than its other rates for "*similar service in the same territory*", a recognition adverted to by the Examiner. Both Willmut and MVG are in the same class, wholesale customers of United purchasing gas for resale. United classifies them as town-border customers. Admittedly, they are located in the same territory. The domestic-gas service rendered to them admittedly is similar. The cities and towns served by them are similar, except for differences of population. There is a substantial similarity of conditions under which Willmut and MVG receive natural gas. Thus, there is a close similarity between them with respect to the pressure at which gas is delivered, seasonal characteristics thereof, load factor, facilities utilized in serving them, type of metering facilities, and delivery points. Nor is there substantial variation in service conditions or in the characteristics of delivery and sale of domestic gas.

We are convinced that United has not established substantial differences in conditions of domestic-gas service to Willmut and MVG justifying it to require Willmut to pay an approximately 50% higher price for such gas than is charged MVG. There is nothing in the record tending to indicate that cost per Mcf to United of transporting and

delivering domestic gas to Willmut is more than the cost of transporting and delivering such gas to MVG. The differences shown by United do not affect our decision that undue discrimination exists with respect to domestic-gas service, such as the fact that MVG's consumption is predominantly industrial, Willmut's predominately domestic; that MVG's over-all load factor is higher than Willmut's; that the seasonal characteristics of industrial gas served is different from that of domestic-gas service; and that the average unit cost of all gas delivered to MVG is not identical to the average unit cost of all gas delivered to Willmut. The only material difference United has established is that it sells domestic gas to MVG at a lower rate than it sells such gas to Willmut.

An unreasonable difference in rates under substantially similar conditions of service constitutes unjust discrimination. *Western Union Telegraph Company* v. *Call Publishing Company*, 181 U.S. 92. United concedes that, under this definition, unjust discrimination exists if Willmut is required to pay a higher price for gas under like conditions of service. The premise upon which the right to the same price stands is, as the Supreme Court said, "like conditions of service." These conditions have been shown. And since "all individuals have equal rights both in respect to service and charges", which was also said in the *Western Union* case, the logical consequence is that Willmut is entitled to the same rate as MVG, as the Examiner properly found. For United to charge one customer approximately 50% more for gas delivered under substantially similar conditions is to require such customer to pay an unreasonable and unduly discriminatory rate.

It will be recalled that, in answer to the complaint, United alleged that its return is less than a just and reasonable return and that its deficiency in earnings will increase in subsequent years. The allegation was unsupported by evidence. United also asserted that its rates over which the

Commission has jurisdiction will of necessity have to be substantially increased. At no time subsequent to July 26, 1947, the effective date of Rate Schedule FPC No. 95, however, has United sought an increase in such rate.

We take official notice of the fact that in 1952 it filed applications for increases in rates for sales to five natural-gas companies and one sale to United Gas Corporation, its parent, as well as in rates for certain transportation services. These rates are currently effective under bond pending decision at Docket Nos. G-2019 and G-2074. But it has not sought to exercise its privilege under the Act to file an increase in the 17.5¢ city-gate rate to MVG.

The Supreme Court has said that "experience does not indicate that utilities are wont to charge themselves out of business" (*Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577, 582, unless there are "extraordinary circumstances making submission to the loss expedient" (*Dayton Power and Light Co.* v. *Public Utilities Commission*, 292 U.S. 290, 312), which cases are also cited by the Examiner.

Upon consideration of the foregoing, we are of the opinion that the 17.5¢ per Mcf rate to MVG must be deemed to be just and reasonable in the absence of evidence to the contrary. The Examiner's order that United file rate schedules for its sale to Willmut containing the rates and charges set forth in Rate Schedule FPC No. 95, is therefore determined to be proper and reasonable.

There is no basis for United's assertion that the Commission's action in permitting the 17.5¢ per Mcf rate to become effective removed the area served by MPL from the Jackson rate zone. No such intent was expressed in the order. Nor can any be implied therefrom, particularly in the light of United's representations made to the Commission as to the reasons for such change.

Reparations

The Examiner correctly disposed of the contention of Willmut relating to reparations. The terms of the Act and the authorities cited by him firmly establish the fact that we do not have the power to grant reparations.

Lawfulness of Past Rates

No substantial reasons have been advanced for us to depart from the Examiner's finding as to lawfulness of past rates.

Other Matters

We turn now to the other exceptions filed by United and Staff counsel.

The exception by United to references in the initial decision to orders of the Commission issued subsequent to hearing is not well taken. If an Examiner may take official notice of reports filed with the Commission subsequent to hearing, as was held in *Wisconsin* v. *Federal Power Commission*, 201 F. 2d 206, unquestionably he may take notice of orders of the Commission itself.

It seems to us that the Examiner did not err in concluding that United rearranged its system operations "in an effort to avoid Commission regulation of the Willmut rate." That conclusion may be reasonably inferred from the evidence adduced in light of the history of relations between United and Willmut. No pretense was made by United at the hearing that such rearrangement was done to improve operating conditions or was required by any operating exigencies. It was done admittedly "on advice of counsel." United contends now that such rearrangement was necessary to insure the passage of intrastate gas to the Philadelphia extension. That circumstance was an effect, not the cause, of the arrangement. If what is contended now were the cause of the arrangement, no justifica-

tion for the obstruction of the flow of interstate gas to Willmut through the Bogalusa line is apparent. In any event, whatever motivated United to cause the rearrangement, whether beneficial or not, cannot obviate the necessity for it to secure the requisite approval under Section 7(b). We think, however, that there is not an adequate basis for an inference that United, by the conduct reflected in this record, intended to squeeze Willmut out of the retail gas business. References thereto in the Examiner's decision should be deleted.

No prejudicial error is caused United by the Examiner's reference to letters written by Willmut to the Commission in 1948. Those portions appearing in the initial decision recite facts contained in other exhibits admitted in evidence in this proceeding.

The initial decision should be modified to show that Willmut commenced to take gas from United at a point on the Sterlington-Jackson line, a few miles west of the Jackson compressor station, rather than as inadvertently stated by the Examiner. The north end connection between the Jackson-Hattiesburg line and the Jackson-Mobile line referred to by him was at the compressor station, and it was made in 1943 subsequent to the issuance of the G-478 certificate.

The Commission, having considered the entire record with respect to the matters involved and the issues presented, including the complaint, the answer thereto, the evidence adduced at the public hearing, the briefs filed, the oral argument before the Examiner, his initial decision and exceptions thereto, and the oral argument before the Commission, further *finds*:

(1) The initial decision and accompanying order filed by the Presiding Examiner on November 26, 1952, should be modified to conform to the views expressed herein and to correct the minor errors, and as so

modified, should be affirmed as the Commission's final decision, as hereinafter ordered.

(2) To the extent that the exceptions filed to such decision are inconsistent with any statement, finding, conclusion, or ordering paragraph contained herein, such exceptions should be denied as hereinafter ordered.

(3) The motion filed by United on December 15, 1952, to cancel and set aside the initial decision and for other relief should be denied, as hereinafter ordered.

Pursuant to the provisions of the Natural Gas Act, particularly Sections 4(b), 5(a), 7(b), 7(e), 14 and 16, the Commission *orders*:

(A) The initial decision of the Presiding Examiner filed on November 26, 1952, in this proceeding, as hereinafter modified, shall become effective as the decision of the Commission as of the date of issuance of this order.

(B) The initial decision be and it is hereby modified in its narrative parts to conform with our views expressed herein and to correct the minor errors noted.

(C) The following finding be and it is hereby added to the Examiner's decision:

> "(28) It is just and reasonable and appropriate in carrying out the provisions of the Natural Gas Act, that United should be required to restore and reestablish the facilities and resume the interstate service as rendered to Willmut prior to February 6, 1947."

(D) The following paragraph be and it is hereby added to the order accompanying the Examiner's decision, to be designated as paragraph (B) and substituted for the paragraph so designated in the decision:

"(B) Within 30 days after the date of issuance of this order United shall:

(1) Restore and re-establish the connections which existed prior to February 6, 1947 between (a) its Jackson-Hattiesburg line and its Jackson-Mobile line at the Jackson Compressor Station, and (b) its Jackson-Hattiesburg line and the Sterlington-Jackson line at a point approximately three miles west of the aforesaid compressor station.

(2) Remove the steel (blind) plate from the orifice meter flange of the meter station located at or near the point where its 10-inch Bogalusa line connects with its Jackson-Hattiesburg line, and restore and re-establish the orifice plate which had been removed;

(3) Make any other appropriate and necessary changes in the aforesaid facilities, which may be required to fully restore and re-establish the facilities to the arrangement existing prior to February 6, 1947;

(4) Resume the full operation of the natural-gas transmission pipe-line facilities authorized, by and in accordance with the provisions of, the certificate of public convenience and necessity granted, by Opinion No. 101 and accompanying order entered August 19, 1943, *In the Matter of United Gas Pipe Line Company,* Docket No. G-478, 3 FPC 551, in conjunction with its other natural-gas transmission pipe-line facilities, for the transportation and sale for resale of natural gas, subject to

the jurisdiction of the Commission, all as more fully described in its application therein, and in the aforesaid Opinion No. 101, and accompanying order; and in accordance with the provisions of the rate schedules required to be filed pursuant to the provisions of paragraph (C) hereof;

(5) Continue the operations of such facilities in accordance with the provisions of the Natural Gas Act, as well as applicable rules, regulations, and orders of the Commission thereunder; and

(6) Immediately upon completion of the acts described in subparagraphs (1), (2), and (3), above, and upon full resumption of the operation required by subparagraph (4), above, file with the Commission, in writing and under oath, an original and four conformed copies, notice of the date or dates of such completion and resumption."

(E) Paragraph (B) appearing in the Examiner's decision be and it is hereby redesignated Paragraph (C).

(F) To the extent that the exceptions filed by United, Willmut, and Staff counsel are inconsistent with the opinion and order of the Commission herein, such exceptions be and the same are hereby denied.

(G) The motion filed by United on December 15, 1952 to cancel and set aside the initial decision and for other relief be and it is hereby denied.

(H) Nothing contained in this order is to be construed as a waiver of any penalties or sanctions which may be imposed pursuant to the provisions of the Natural Gas Act against United, its agents, or officers, or any

of them, for any unauthorized action disclosed by the record herein.

By the Commission. Chairman Kuykendall not participating. Commission Draper dissenting.

LEON M. FUQUAY,
Secretary.

Adopted: May 26, 1953
Issued: June 1, 1953

Docket No. G-1158

In the Matter of

WILLMUT GAS & OIL COMPANY, ET AL.

v.

UNITED GAS PIPE LINE COMPANY

DRAPER, Commissioner, *dissenting*:

I regret that I cannot subscribe to the opinion of the majority in this case. That opinion is based on the premise that this Commission has jurisdiction to consider and adjudicate certain rate questions arising from transactions which have been shown to be intrastate in character.

The fact that these transactions were formerly interstate is not disputed. The fact that their conversion to an intrastate status by United is a *fait accomplis* is not disputed. The fact that this conversion without authorization from this Commission is a violation of Section 7(b) of the Natural Gas Act is affirmatively asserted, yet nowhere is it suggested that Section 20 of the Act might apply to the situation.

The subject matter of proceedings of this nature must be either interstate or intrastate. How it came to be so

cannot affect that basic fact. If there is no transportation in interstate commerce and no sale for resale in interstate commerce, there is no jurisdiction vested in this Commission. The apparent theory that violation of Section 7(b) by United converts non-jurisdictional matters to jurisdictional is one I cannot follow. If there is such violation, the Act prescribes the clear course to be taken, and that course, it seems to me, is not to ignore the existing state of facts by proceeding as though the violation had not occurred and we were still faced with a situation which the record shows to have ended in 1947.

Incidentally, counsel for United made the following statement at the oral argument:

> "The Examiner declared United's rearrangement of its system operation evidenced 'an effort to avoid Commission regulation of the Willmut Rate.' The only evidence on this point in the record is United's unquestioned *proof* that these rearrangements were made in order to transport intrastate gas to United's newly constructed 'Philadelphia extension' and *that the Commission was fully advised of the changes.*"[1]
>
> (Emphasis supplied.)

If the Commission had been so advised without taking steps under Section 20, it would almost appear that we had for years condoned the acts which the majority now seeks to order undone.

Had United sought and received authorization to do the acts which have made these transactions intrastate, I doubt that anyone would maintain that the rate issues could legally be considered and decided by this Commission.

I believe that we should be realistic and recognize that if a violation has occurred appropriate action should be instituted under Section 20. Further, it is my belief that

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[1] (Transcript, Page 706)

we cannot now deal with the merits of these complaints against the level of United's rates.

With regard to United's motion to set aside the Examiner's decision to omit the intermediate decision procedure, etc., I agree that it should be dismissed on the grounds stated in the majority opinion.

CLAUDE L. DRAPER, *Commissioner*

Filed: May 29, 1953
Issued: June 1, 1953

APPENDIX IV

The following portions of the Constitution of the United States and the Natural Gas Act are relevant:

The Constitution of the United States

ARTICLE V.

No person shall . . . be deprived of life, liberty, or property, without due process of law; . . .

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XIV.

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Natural Gas Act.

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection

with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order:

Sec. 7. (b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

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No. 1021

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

WILLMUT GAS & OIL COMPANY, *Petitioner*

v.

UNITED GAS PIPE LINE COMPANY, *et al., Respondents*

MEMORANDUM BRIEF IN SUPPORT OF PETITION FOR CERTIORARI FOR THE CITY OF HATTIESBURG, MISSISSIPPI

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WILLMUT GAS & OIL COMPANY, *Petitioner*

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MEMORANDUM BRIEF IN SUPPORT OF PETITION FOR CERTIORARI FOR THE CITY OF HATTIESBURG, MISSISSIPPI

REASONS FOR FILING THIS BRIEF

This Memorandum Brief is filed in support of Petitioner here, Willmut Gas & Oil Company, pursuant to Rule 42(4) of the Rules of this Court. Petitioner is a public utility authorized to distribute natural gas in Hattiesburg, Mississippi. Any recovery by it from Respondent United Gas Pipe Line Company will inure in large part to the benefit of the residents of Hattiesburg. Hattiesburg therefore files this brief as *parens patriae* for and on behalf of its inhabitants.

THE BASIC QUESTION IN THE CASE

A natural gas company is, pursuant to the Natural Gas Act, certificated by the Federal Power Commission to make sales of gas to Petitioner in interstate commerce at a rate filed with the Commission. It abandons those sales in violation of the Natural Gas Act and substitutes therefor sales in intrastate commerce at the same rate. Thereafter the Federal Power Commission on the complaint of Petitioner, orders sales in interstate commerce resumed, finds the rate filed with it as governing interstate sales to Petitioner to be unjust, unreasonable, discriminatory and unlawful and orders it reduced. Do the Natural Gas Act and the principles of *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Company*, 341 U.S. 246, deprive a state court of jurisdiction to award Petitioner reparations under the law of the state for excessive charges paid for the gas sold in intrastate commerce during the time when sales in interstate commerce had been abandoned?

STATEMENT OF THE CASE

From 1943 until February 6, 1947 United, pursuant to certificates issued by the Federal Power Commission under Section 7(e) of the Natural Gas Act, sold and delivered to Willmut at Hattiesburg, Mississippi gas produced in Texas and Louisiana. United charged Willmut a rate of 25¢ per mcf, which rate was filed with the Federal Power Commission pursuant to Section 4(e) of the Natural Gas Act. In 1947, when United commenced to take gas from the Gwinville Field in Mississippi it physically re-arranged its pipeline system so as to discontinue the flow of interstate gas from Texas and Louisiana to Willmut and replace

it with a flow of intrastate gas from the Gwinville, Mississippi field.

On December 8, 1948 Willmut, jointly with the City of Hattiesburg, Mississippi, filed a complaint with the Federal Power Commission under Section 5(a) of the Natural Gas Act alleging that the rate of 25¢ per mcf filed with the Commission for sales to Willmut was unjust, unreasonable, unduly discriminatory and preferential, and therefore unlawful. United challenged the jurisdiction of the Commission to entertain the complaint on the ground that the gas delivered to Willmut was produced, transported, delivered and consumed wholly within the State of Mississippi.

The Federal Power Commission held hearings on the complaint and at the conclusion thereof, on June 1, 1953, issued Opinion and Order No. 252. That Opinion and Order found that United's re-arrangement of its system constituted both a physical abandonment of facilities subject to the jurisdiction of the Commission and an abandonment of service in interstate commerce rendered by means of such facilities without the permission and approval of the Commission, all in violation of Section 7(b) of the Natural Gas Act. It held that this illegal abandonment of facilities and service and the substitution of intrastate service therefor did not deprive the Commission of jurisdiction to entertain the complaint. It therefore ordered United "to restore and re-establish the facilities and resume the interstate service as rendered to Willmut prior to February 6, 1947."

By the same Opinion and Order No. 252 the Federal Power Commission found that "by its failure without lawful justification to make natural gas available to

Willmut at the same rates or charges voluntarily established [for another customer], United is unlawfully subjecting Willmut to undue prejudice and disadvantage; and unlawfully granting undue preference and advantage to [that other customer] and that such practices by United are unjust, unreasonable, unduly discriminatory and preferential, and unlawful, in violation of the provisions of the [Natural Gas] Act." It therefore ordered United to reduce its rate to Willmut from 25¢ per mcf to 17.5¢ per mcf.

Thereafter Willmut filed a bill in equity in the Chancery Court of Forrest County, Mississippi for the recovery of excessive, discriminatory and unlawful rates charged by United for intrastate gas delivered to Willmut from February 6, 1947 to June 20, 1953, the date on which United complied with Opinion and Order No. 252 of the Federal Power Commission. United filed a motion to dismiss the bill on the ground that the Federal Power Commission had exclusive authority in the matter. The Chancery Court overruled this motion. On an interlocutory appeal the Supreme Court of Mississippi held:

> "The jurisdiction of the Federal Power Commission having attached to all natural gas sold to Willmut, there is no residual jurisdiction for independent court action. The local component [of gas] lost its intrastate character and there remained no power in the courts to apply the common law of the State.
>
> "The chancery court erred in not sustaining the motion to dismiss the bill for want of jurisdiction to determine the issues presented, and its order is therefore reversed. On interlocutory appeal we ordinarily remand the case to the trial court, but in this case no additional or amended

pleading could enable Willmut to maintain its suit. It would serve no purpose to remand the case, and final judgment will be rendered here dismissing the bill."

So holding, the Court reversed the order of the Chancery Court of Forrest County and entered final judgment dismissing Willmut's bill.

REASONS WHY THE WRIT SHOULD BE GRANTED

Preliminary Statement

The Natural Gas Act was designed to close the regulatory gap existing as a result of holdings of this Court that there was a lack of constitutional power in the states to regulate wholesale sales of natural gas in interstate commerce. *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672. The Supreme Court of Mississippi in this case holds that the authority of the Federal Power Commission under the Natural Gas Act to regulate sales in *interstate* commerce, specifically its authority to compel sales to be made in that commerce at rates fixed by the Commission, destroys the power of the states to regulate the rates for sales actually made *intra*state commerce. This in effect interprets the Natural Gas Act as closing one regulatory gap only to open another.

The Supreme Court of Mississippi grounds its decision primarily on *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246. It interprets this Court's opinion in that case as holding that the Natural Gas Act destroyed Petitioner's right under the common law of Mississippi to a reasonable rate for sales of gas produced, transported, delivered and consumed wholly in Mississippi. We submit that

this interpretation of the *Montana* Case is erroneous. Moreover, it squarely conflicts with the interpretation of that case by the United States Court of Appeals for the District of Columbia Circuit in *U. S.* v. *Davidson Transfer & Storage Company, Inc.*, No. 14123, decided April 24, 1958.

There can be no doubt that the Supreme Court of Mississippi has decided a federal question of substance in such a way as to seriously upset the balance of governmental power between the states on the one hand and the United States on the other. This Court has no function more important than to assure that this balance is properly struck and maintained. Thus this case clearly calls for the exercise by this Court of its discretion to review on writ of certiorari. Rule 19.

The Montana-Dakota Case

Montana-Dakota Utilities Co. purchased electric power from Northwestern Public Service Co. in interstate commerce at rates filed with the Federal Power Commission pursuant to the Federal Power Act. It invoked the federal question jurisdiction of a United States District Court in a complaint alleging that the Federal Power Act gave it a right to reasonable rates, that the filed rates Northwestern had charged it over a period of years were unreasonably high, that Northwestern had misled the Federal Power Commission into accepting the rates by failing to comply with its obligations of disclosure under the Federal Power Act, that the rates had therefore been improperly established and filed, and that, through interlocking directorates, Northwestern had fraudulently prevented Montana from seeking redress from the Commission while the rates were in effect. Judgment was sought

for the difference between the rates charged and what Montana alleged to be the reasonable rates.

This Court held that since there was no diversity of citizenship the complaint failed to state a cause of action cognizable in a United States District Court. Its rationale was that under the Federal Power Act rate reasonableness is not "a justiciable legal right" but rather "a criterion for administrative application in determining a lawful rate." The "right to a reasonable rate is the right to the rate which the Commisson files or fixes." This Court therefore directed that the complaint be dismissed for failure to state a claim upon which relief could be granted.

The Montana-Dakota Case Is Inapposite Here

The contrast between the situation in the *Montana* Case and the situation in this case is sharp. In the *Montana* Case the plaintiff purchased electric power in *inter*state commerce at rates filed with and accepted by the Federal Power Commission as governing the purchases made. In this case Petitioner purchased gas in *intra*state commerce. It is true that the rates at which it purchased were filed with the Federal Power Commission by United. However, they were not filed as applicable to its *intra*state sales in issue. They were filed as applicable to *inter*state sales of gas produced in Louisiana and Texas, which sales it had abandoned before the period of time involved here. In the *Montana* Case the plaintiff asserted a justiciable legal right under the Federal Power Act to a rate other than that filed with the Federal Power Commission as governing the *inter*state purchases it made. In this case Petitioner asserts a right under the common law of Mississippi to a reasonable rate for the *intra*-

state purchases it made, governing which purchases there was no rate filed with the Federal Power Commission.

The Supreme Court of Mississippi held that the rates for sales of gas to Petitioner in intrastate commerce were subject to the exclusive regulation of the Federal Power Commission because on seven occasions over a course of six years, each of which was of only a few hours duration, there were sales in interstate commerce through the same facilities and because some of those facilities and the interstate service rendered by them had been unlawfully abandoned in violation of the Natural Gas Act.

It may be that the jurisdiction of the Federal Power Commission to regulate the rates for sales of gas in interstate commerce carries with it the ancillary jurisdiction to regulate the rates for sales wholly in intrastate commerce commingled therewith. See *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U.S. 414. But until that jurisdiction is in fact exercised the rates for sales in intrastate commerce are clearly regulable by the state in which that commerce is carried on. In this case the Commission at no time purported to regulate United's rates for its intrastate sales to Petitioner. Indeed, as it pointed out in its Opinion No. 252, Appendix III to Petition for Certiorari, p. 25a, it did not even know that those sales were being made until it heard the evidence on Petitioner's complaint in Docket No. G-1158. The only jurisdiction the Commission exercised over United's *intra*state sales to Petitioner was to find that they were unlawful under the Natural Gas Act and to order them stopped. Thus it ordered United to: "Resume the full operation of the natural

gas transmission pipe-line facilities [previously certificated] for the transportation and sale for resale of natural gas, subject to the jurisdiction of the Commission . . . and in accordance with the provisions of the rate schedules required to be filed pursuant to the provisions of [this order]." Opinion No. 252, Appendix III to Petition for Certiorari, p. 37a.

Had United sought and obtained from the Federal Power Commission permission to abandon its interstate service to Petitioner and then substituted intrastate service therefor, there can be no doubt that the rates for its sales in intrastate commerce would have been regulable by the State of Mississippi. Can the result be different simply because it illegally abandoned interstate service and substituted intrastate service therefor? The answer must be no. To answer yes is to say that United may profit from its own wrongdoing—that by the device of violating the federal law it may gain exemption from the application of state law.

The Conflict Between the Supreme Court of Mississippi and the Court of Appeals for the District of Columbia

The Supreme Court of Mississippi interpreted the *Montana* Case, *supra*, as holding that the Federal Power Act abrogated respecting the interstate sales regulated under it the common law right to reparations from a public utility for the exaction of an unreasonable rate. Assuming this interpretation to be correct, we submit that, as we have discussed *infra*, it has no bearing here because the sales in issue here were made in intrastate commerce.

However, the correctness of the interpretation of the Supreme Court of Mississippi is by no means clear.

Neither the Federal Power Act nor the Natural Gas Act in terms abrogate any common law rights existing at the time of their enactment, and it is axiomatic that repeals by implication are not favored. There is nothing in the facts or opinion in the *Montana* Case that compels the conclusion that this Court held that common law rights were so abrogated.

That was a suit in a United States District Court to vindicate a right that was alleged to have been created by a federal statute, et al. a right under the Federal Power Act to reparations for the exaction of an unreasonable rate for sales of electricity in interstate commerce. This Court in terms held only that *under the Federal Power Act* there was no legal right to any rate other than the rate filed with the Federal Power Commission, that therefore there was no judicially cognizable *federal* question, and that therefore, absent diversity of citizenship, there was no cause of action cognizable in a *federal* court. This Court did not discuss, much less make any holding respecting, the right of the plaintiff to maintain in a *state* court a *common law* action to recover reparations for the exaction of an unreasonable rate.

At least two United States Courts of Appeals have interpreted the *Montana* Case as leaving intact whatever common law rights existed before the enactment of the Federal Power Act, in other words, as merely delimiting and defining the jurisdiction of federal courts under the Federal Power Act. *U. S.* v. *T.I.M.E., Inc.*, 252 F. 2d 178 (C.A. 5th 1958), petition for cert. pending, No. 1027, Oct. Term 1957, *sub nom. T.I.M.E., Inc.* v. *U. S.*; *U. S.* v. *Davidson Transfer & Storage Co.*, C.A.D.C. No. 14123, decided April 24, 1958. Both of those cases were suits in federal district courts against the United States under the Tucker

Act for breach of contract. In both cases the plaintiffs, common carriers by motor, alleged that the United States had refused to pay for transportation in interstate commerce applicable rates filed with the Interstate Commerce Commission. In both the United States defended on the ground that the filed rates were unreasonably high and therefore unlawful under Part II of the Interstate Commerce Act. In both the District Courts, relying on *Montana-Dakota*, held that the declaration in Section 216(d) of Part II of the Interstate Commerce Act, 49 U.S.C.A. 316(d), that unreasonable rates were prohibited and unlawful was merely a criterion for administrative action, and that the United States as a shipper had no justiciable legal right to any rate other than the filed rates. In both cases the Courts of Appeals reversed, holding the rule of *Montana-Dakota* to be inapplicable where, as in both, the shipper sought to enforce a common law right which, because of the Tucker Act, was cognizable in a federal district court. To quote the opinion of the District of Columbia Circuit in the *Davidson* Case, Slip Op., p. 9:

> "The difficulty [in Montana-Dakota] was not lack of a cause of action but lack of a cause cognizable in a federal court . . . In the case before us on this appeal there is a federally cognizable cause of action, an alleged breach of contract by the United States, and so this controversy falls outside the *Montana-Dakota* ruling."

If the holdings in the *T.I.M.E.* Case and the *Davidson* Case are right—if, despite the enactment of Part II of the Interstate Commerce Act and the interpretation of the substantially identical rate regulatory provisions of the Federal Power Act in the *Montana* Case, there is a judicially cognizable common law

right to a reasonable rate for sales clearly made in *inter*state commerce, *a fortiori* there is a judicially cognizable common law right to a reasonable rate for sales in *intra*state commerce. It is this latter right that Petitioner seeks to vindicate here. It is this right that the Supreme Court of Mississippi denied it.

The Concurrent Regulatory Authority of the United States and the States

The implied but nonetheless basic premise of the Supreme Court of Mississippi is that the mere existence of federal regulatory power over sales of gas for resale by United to Willmut forecloses state regulation. See *Missouri* v. *Kansas Natural Gas Co.*, 265 U.S. 298; *Public Utilities Com.* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83; *State Corp. Com.* v. *Wichita Gas Co.*, 290 U.S. 561. These cases held that the regulation of the wholesale rates for gas and electricity moving in interstate commerce was beyond the constitutional powers of the states.

We submit that these cases do not reflect sound constitutional doctrine. This Court has so indicated. *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 684. Indeed it has so held in sustaining state minimum price orders applicable to sales of gas in interstate commerce which were not in conflict with the provisions of the Natural Gas Act as then interpreted or with outstanding orders of the Federal Power Commission issued thereunder. *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179; *Phillips Petroleum Co.* v. *Oklahoma*, 340 U.S. 190. The holdings in the two last cited cases are not undermined by the subsequent holding in *Natural Gas Pipeline Company* v. *Panoma Corp.*, 349 U.S. 44, striking

down similar state minimum price orders. Rather, a comparison of the holdings illustrates the point. Thus, state regulation was allowed where, as here, federal authority was not in fact exercised. State regulation was denied where, as in *Panoma*, federal authority was in fact exercised.

In the *Cities Service* Case, at p. 186, this Court said:

> "The Commerce Clause gives to the Congress a power over interstate commerce which is both paramount and broad in scope. But due regard for state legislative functions has long required that this power be treated as not exclusive. Cooley v. Board of Wardens of Port of Philadelphia, 1851, 12 How. 299, 13 L. Ed. 996. It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce. [Citations] The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo on interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions. Nor should we lightly translate the quiescence of federal power into an affirmation that the national interest lies in complete freedom from regulation."

The quoted statement is sound law and the tests it lays down for the exercise of state authority are met here. Certainly the rates United charges Petitioner, being in large part determination of the rates Petitioner charges ultimate consumers, are of vital local concern. Certainly the grant by Mississippi of the relief Petitioner seeks against United will not have any impact on or in any way discriminate against or

burden interstate commerce. Nor is this a case in which a national interest preventing State action must be weighed against the local interest to be protected. On the contrary, the relief Petitioner seeks furthers the precise national interest that the Natural Gas Act was passed to further, i.e., the protection of ultimate consumers of gas from unreasonable rates. Petitioner seeks to have Mississippi do precisely what the Federal Power Commission would have done had the Congress granted it the necessary authority, i.e., require United to disgorge monies collected under exorbitant rates. Mississippi and the United States both having concurrent constitutional power in the matter at issue and the Congress having chosen not to exercise jurisdiction, Mississippi is free to do so.

CONCLUSION

For the reasons set forth in the Petition for Certiorari and in this Brief, the City of Hattiesburg prays the Court to issue a writ of certiorari to the Supreme Court of Mississippi.

Respectfully submitted,

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Dated: June 6, 1958

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OCTOBER TERM, 1957.

No. 1021.

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REPLY OF WILLMUT TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Preliminary Remarks.

A.

Primarily, respondent does not attack the statement of the questions set forth in the petition, but in its response specifically confirms the truth enunciated by the Federal Power Commission that the "facts are largely without dispute", or, as stated in the brief, p. 27:

> "* * * The facts are undisputed. The only dispute has been as to the legal conclusion to be reached, namely, whether the gas was '*intrastate*' or '*interstate*'. * * *." (Italics ours unless otherwise noted.)

Respondent further accepts as appropriately here the six volumes of testimony before the Federal Power Commission filed by petitioner with the Supreme Court of Mississippi in support of its suggestion of error, Br. p. 19. These volumes were not integrated by respondent who consciously omitted them from its pleadings so that naught therein shown was judicially known to Mississippi's Court when it extirpated Mississippi jurisdiction in virtue of the Natural Gas Act (the Act); but we now confidently reassert that stated in the petition as to (a) the Northern segment and (b) the Southern segment (Pet. pp. 21, 24); and, therefore, have Gwinville gas exclusively produced, transported and consumed by residents of Mississippi within fifty miles of the point of origin who were thereasto entitled to enjoy this Mississippi natural resource at just and reasonable rates, based upon the utility "picking it off the vine" and free from the additional charges incident to transportation from the State and consumption beyond whereasto the rates of the Commission would be appropriate. That these local rates may be different from and less than the interstate rates is fundamentally settled under the Transportation Act. Compare *North Carolina* v. *United States*, 325 U.S. 507, 89 L.ed. 1762, where the intrastate rate was 1.65¢ per mile and the interstate rate 2.2¢ per mile. Approved in *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Illinois*, 355 U.S. 309, 2 L.ed. 2d 292, 297. See, also, *Florida* v. *United States*, 282 U.S. 194, 75 L.ed. 291. But the State sovereignty was paramount.

B.

Respondents rely upon an interpretation of the Act in virtue of Mississippi's decision, making the Federal jurisdiction exclusive as to this intrastate movement, wherein the fundamental error is.

1. We, with deference, submit the arguments in the petition are unanswered, but supplementing, submit:

2. In the case of *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 67 L.ed. 1117, Mr. Justice Holmes said, p. 1135:

> "* * * However far the decision in the case referred to goes, it cannot outweigh the consensus of the other decisions to which I have referred and that seem to me to confirm what I should think plain without them, that the Constitution does not prohibit a state from securing a reasonable preference for its own inhabitants in the enjoyment of its products even when the effect of its law is to keep property within its boundaries that otherwise would have passed outside. Hudson County Water Co. v. McCarter, 209 U.S. 349, 357, 52 L.ed. 828, 832, 28 Sup.Ct.Rep. 529, 14 Ann.Cas. 560."

Mr. Justice Brandeis said, pp. 1136, 1143:

> "* * * Each was under the common-law duty of furnishing to the public, through the West Virginia territory in which it does business, adequate service. * * *.
>
> * * *
>
> "* * * In no other field of public service regulation is the controlling body confronted with factors so baffling as in the natural gas industry; and in none is continuous supervision and control required in so high a degree."

See, also, *Foster-Fountain Packing Co.* v. *Haydel*, 278 U.S. 1, 73 L.ed. 147. The police power is omni-present and may not be waived. Compare *Stone* v. *State of Mississippi*, 101 U.S. 814, 25 L.ed. 1079. See, also, *Pace* v. *State*, 191 Miss. 780, 4 So.2d 270, collecting and following decisions of this Court.

So, when these Mississippi consumers were thus fundamentally entitled to gas originating at their very doors, it was not the intention of the Act to strike down that whereto, *quoad* intrastate gas, they were entitled. In short, Mississippi's Court by its flat-footed declaration of no jurisdiction as to intrastate gas has discredited, insofar as it was able to do so, and as to Mississippi's local courts, overruled the decisions of this Court, beginning with *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, 610, 88 L.ed. 333, 349, wherein it was said:

> "* * * the bill was designed to take 'no authority from state commissions' and was 'so drawn as to complement and in no manner usurp State regulatory authority'. * * *."

This has been reaffirmed in *Central States Electric Co.* v. *Muscatine*, 324 U.S. 138, 89 L.ed 801, 807 thus:

> "The Natural Gas Act clearly discloses that, though its purpose may have been to protect the ultimate consumer at retail, the means adopted was limited to the regulation of sales in interstate commerce at wholesale, leaving to the states the function of regulating the intrastate distribution and sale of the commodity. That Congress intended to leave intrastate transactions to state regulation is clear, not only from the language of the Act, but from the exceptionally explicit legislative record, and from this court's decisions."

Interstate Natural Gas Company v. *Federal Power Commission*, 331 U.S. 682, 690, 91 L.ed. 1742, 1748:

> "* * * In denying the Federal Power Commission jurisdiction to regulate the production or gathering of natural gas, it was not the purpose of Congress to free companies such as petitioner from effective public control. The purpose of that restriction was, rather, to preserve in the States powers of regulation in areas

in which the States are constitutionally competent to act. Thus the House Committee Report states: 'The bill takes no authority from State Commissions, and is so drawn as to complement and in no manner usurp State regulatory authority . . . .'. * * *."

Panhandle Eastern Pipe Line Co. v. *Public Service Commission*, 332 U.S. 507, 92 L.ed. 128, 139:

"* * * Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the state could not reach. * * *.

* * *

"The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level. We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority. * * *."

Federal Power Commission v. *Interstate Natural Gas Company*, 336 U.S. 577, 93 L.ed. 895.

Federal Power Commission v. *East Ohio Gas Company*, 338 U.S. 464, 94 L.ed. 268, 231:

"This Court can sustain such overlapping and overriding of the state's authority only by repudiating its own recent statements. After reviewing the history of the Natural Gas Act, we have said the 'Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions'. Public Utilities Com. v. United Fuel Gas Co., 317 U.S. 456, 467, 87 L.ed. 396, 402, 63 S.Ct. 369. * * *. And only last year we observed that, 'The Natural Gas Act was designed to supplement state power and to

> produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other'. Federal Power Com. v. Panhandle Eastern Pipe Line Co., 337 U.S. 498, 513, 93 L.ed. 1499, 1509, 69 S. Ct. 1251."

So we have the State power supplemented by the Act to bridge a certain chasm; but where State power was adequate, this Court did not strike it down, even as to interstate movement, but recognized it as that which must be preserved to effectively regulate the unlawful acts of utilities, saying in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507, 92 L.ed. 128, 139:

> "It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption. * * *."

United States v. *Public Utilities Commission*, 345 U.S. 295, 97 L.ed. 1020, 1035:

> "* * * Especially in the litigation arising under the Gas Act has this Court expressed the view that the limitations established on Commission jurisdiction therein were designed to coordinate precisely with those constitutionally imposed on the states. * * *."

Phillips Petroleum Company v. *Wisconsin*, 347 U.S. 672, 98 L.ed. 1035, 1048; *Memphis Natural Gas Co.* v. *Stone*, 335 U.S. 80, 92 L.ed. 1832, 1844; *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 93 L.ed. 1499, 1512; *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464, 94 L.ed. 268, 283, dissenting opinion Mr. Justices Jackson and Frankfurter.

If respondent's position is correct, not only would Chapter 372, *Mississippi Laws of 1956*, be unconstitutional, but if this decision be allowed to stand, State sovereignty has ceased to exist all along the line, as to:

(a) Section 24, *Mississippi Constitution;*

(b) Intrastate railroad rates, sustained as constitutional as long ago as the *Railroad Commission Cases* (*Stone* v. *Farmers Loan & Trust Co.*), 116 U.S. 307, 29 L.ed. 636;

(c) Regulation of telephones, Chapter 372, *Mississippi Laws of 1956;*

(d) Regulation of telegraphs, Chapter 372, *Mississippi Laws of 1956;*

(e) Regulation of motor carriers, Secs. 7632, *et seq.*, *Recompiled Mississippi Code of 1942;*

(f) The Oil and Gas Board, Secs. 6132-01, *et seq.*, *Recompiled Mississippi Code of 1942*, under which there are the standard provisions as to conservation and proration; as to all of which there is complementary Federal legislation, but in no case have we found a court going to the extent of holding as to that which is exclusively intrastate that the Federal legislation superseded in its entirety State power.

C.

1. Presently had United so thus acted pursuant to Chapter 372, *Mississippi Laws of 1956*, the Public Service Commission would have fixed the rate whereat these consumers would be entitled and under Sections 7716-04, 7716-08, 7716-09, 7716-11, 7716-12, *Recompiled Mississippi Code of 1942*, that rate had to be just and reasonable and predicated upon the property used and useful thereasto.

It is the petitioner's contention that its right to relief on behalf of the consumers is not limited by the discrimination of 17.5¢ against 25¢ per Mcf, but that for the gas consumed, the rate in excess of that which is just and reasonable may be sued for and recovered. Compare *Western Union Tele. Co.* v. *Call Publishing Co.*, 181 U.S. 92, 45 L.ed. 765.

The taking away from those thus entitled to the natural resources at their door and then precluding those thus wronged from having any access to Mississippi's courts—sovereignty—is that which is so fundamentally requisite for rectification.

2. Respondent relies upon the contract between United and Willmut of August 20, 1943, for twenty years, as being so unitizing as to the gas thereunder furnished that the Constitution of the State of Mississippi, as well as its several statutes, became subordinated thereby to the Act. This error is fundamental, and we further submit:

3. Those points made in the petition have not, with deference, been answered.

4. This contract persisted for twenty years, appears as Exhibit "C" to the complaint, and though filed with the Federal Power Commission as Rate Schedule No. 73, by reason of interstate gas being thereunder furnished, there was no requirement by that contract that it be interstate gas. Respondent claimed the right to deliver, and did deliver intrastate gas thereunder, and upon such delivery, petitioner was compelled to pay and to transfer to its customers the unlawful exaction of 25¢ per Mcf. Confessedly for gas originated locally and moving less than fifty miles, United was not in a position in good conscience to exact 25¢ per Mcf when it was exacting at Jackson only 17.5¢ per Mcf for interstate gas coming hundreds of miles. Petitioner has

found no case nor has respondent cited any in which a contract of this character destroyed State sovereignty and made the national sovereignty exclusive. In addition, this contract expressly provided, Section XXII:

> "This agreement and the rights and obligations created hereunder are made subject to and shall conform to all valid present or future laws and rules, regulations and orders of any governmental agency having jurisdiction over the parties or the subject-matter hereof, especially the Federal Power Commission, and both parties agree to conform thereto."

It is not the policy of the Federal government to preempt that regulation which can be under State sovereignty effectively exercised and the decisions hereinbefore collected demonstate that private parties may not thus usurp sovereignty by a private agreement. This was a Mississippi contract. Its laws admeasured. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 78 L.ed. 1178. And it was, under Mississippi law, divisible. Compare *Armfield* v. *Nash*, 31 Miss. 361; *Moore* v. *Illinois C. R. Co.*, C.A. 5, 136 F.2d 412, certiorari denied 320 U.S. 771, 88 L.ed. 461. See, connecting case, *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630, 85 L.ed. 1089. See, also, *Williams* v. *Mid-South Paving Co.*, 200 Miss. 103, 25 So.2d 792.

D.

Respondent contends that the adjudication by the Federal Power Commission in Docket No. G-1158 is adequate to conclude the consumers, if it oe that the Natural Gas Act as such does not so do. With deference, this point is well covered in the original petition, but supplementally we submit:

1. The fixation of the 17.5¢ rate on a basis of discrimination after June 30, 1953, was exclusively legislative in

character and not judicial. Respondent adverts to Docket G-1142 before the Federal Power Commission, being a general investigation of the reasonableness of the rates of United. This rate investigation, Docket G-1142, G-2019, *et al.*, of all of the rates of United to which Willmut was and is a party, was reopened by the Commission on June 20, 1958, for further legislative action.

Furthermore, the power delegated to the Commission was exclusively as to the future—not as to the past—and as phrased in *Hope Natural Gas Co.* v. *Federal Power Commission*, C.A. 4, 134 F.2d 287, 309-310:

> "The fundamental difference between quasi-legislative and quasi-judicial power is that the one is concerned primarily with prescribing regulations for the future, the other with determining rights in the light of what has occurred in the past. Cf. Baer Bros. v. Denver & R. G. R. Co., 233 U.S. 479, 486, 34 S.Ct. 641, 58 L.ed. 1055. The Natural Gas Act shows clearly that it was the intention of Congress to give the Commission quasi-legislative power, i.e. regulatory power as to future rates; but there is no indication of any intention to clothe it with judicial or quasi-judicial powers with respect to past charges or practices, such as was vested in the Interstate Commerce Commission by section 9 of the Interstate Commerce Act. 49 U.S.C.A., § 9. * * *."

This was substantially approved by Mr. Justice Douglas on review, *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 88 L.ed. 333.

That such rates thus fixed for the future are legislative is thoroughly settled under the Transportation Act, and this Court dealt therewith in *Oklahoma Packing Co* v. *Oklahoma G. & E. Co.*, 309 U.S. 4, 84 L.ed. 537, 539:

> "* * * But, in Community Natural Gas Co. v. Corporation Commission, 182 Okla. 137, 76 P. 2d 393, de-

> cided after the decree here in issue, the Oklahoma court formally characterized its review in cases prior to the decision in the Oklahoma Cotton Ginners' Asso. Case as 'legislative', refused to give that decision retroactive effect, and therefore deemed the res judicata doctrine inapplicable to these prior reviews. Hence, the plea of res judicata in this case must fail, for on that issue state law is determinative here. * * *."

So, the Commission determined G-1158 solely on the discrimination feature between 25¢ and 17.5¢ per Mcf, but the question in G-1158 as to whether the rate was just and reasonable still persists and is a part of G-1142, G-2019 *et al.*, now reopened by the Commission.

It was this aspect that raised the doubt as to whether this pointed decision in favor of petitioner could be *res judicata*, that is, that the future fixation was legislative and did not relate to the past.

Reverting to the opinion, the Commission adjudged appropriately that it had no jurisdiction as to (a) reparations and (b) fixation as to past transactions and, therefore, thereasto a dismissal was made for want of jurisdiction.

Had this proceeding been in the Federal Court and that Court, with the jurisdiction questioned, adjudged the jurisdiction to have existed then there would be, *quoad* jurisdiction, *res judicata*. Compare *Stoll* v. *Gottlieb*, 305 U.S. 165, 83 L.ed. 104. But the Commission dismissed for want of jurisdiction, which did not preclude a subsequent proceeding in a court having jurisdiction. In *Hughes* v. *United States*, 71 U.S. 232, 18 L.ed. 303, 305, this Court said:

> "* * * In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases,

> and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit. * * *."

In *Swift* v. *McPherson*, 232 U.S. 51, 58 L.ed. 499, 503, Mr. Justice Lamar thus adverted:

> "The record presented an unusual and somewhat ludicrous shifting of positions—with the defendant insisting that a decree be entered against himself; the complainant resisting a decree in his favor; and the defendant, with no cross bill filed, excepting to a dismissal. Of course, this reversal of position does not change the legal effect of the decree, but it serves to emphasize the fact that it was not a decree against plaintiff on the merits, but one based on McPherson's motion which asserted a contract fixing liability and giving him rights dependent on the ultimate outcome of the investment. The court did not decide what those rights were, nor did it adjudicate that a suit to enforce them could not thereafter be filed. The decree, not being on the merits, could not be a bar to such subsequent suit in a state or United States court (Texas Cotton Products Co. v. Starnes, 128 Fed. 183). * * *."

See, also, *Tyler Gas Service Co.* v. *Federal Power Commission*, C.A., D.C., 247 F.2d 590; 42 *Am.Jur.*, "Public Administrative Law", Secs. 161, 163, pp. 520, 524; 73 *C.J.S.*, "Public Administrative Bodies and Procedure", Sec. 147, p. 480.

E.

The effect of Mississippi's Court's expanding Federal jurisdiction on Mississippi consumers of Mississippi gas produced, transported and burned within Mississippi:

United does not challenge the importance of that determined by Mississippi's Court and the necessity of recti-

fication here to prevent needless confusion and expense. Furthermore, respondent does not deign to notice that made requisite by the Federal Power Commission in *Federal Power Commission* v. *Interstate Natural Gas Co.*, 331 U.S. 693, 91 L.ed. 1749, that there be a distribution of the excess to the ultimate consumers who actually bore the wrong admitted by United and for whom, as trustee, Willmut here sues. A court will never permit a trust to fail for want of a trustee, nor will it suffer a trustee to forfeit the rights of the *cestui que trustents*. We make challenge, with deference, of respondent's reply as specious and a fundamental *petitio principii*.

It is respectfully submitted, therefore, that such full response has been made hereby that the Court need not further consider that herein said, but if not satisfied, then:

Reply to Brief.

In response to respondent's COUNTER STATEMENT, Br. p. 1, using respondent's numbering, we submit:

I.

Respondent would lead the Court to believe that the contract, Rate Schedule No. 73, related exclusively to interstate gas and the rate therefor, 25¢ per Mcf. Petitioner challenges. The contract shows (a) that the 25¢ per Mcf rate expired July 25, 1947; and (b) the contract was for Willmut's requirements, but to supply these requirements United was at liberty to introduce intrastate gas and, as shown, did so exclusively, with the approval of the Federal Power Commission as to the segment of its line North of the Gwinville 12" tie line.

Petitioner's postulate was and is that, there being local gas produced, transported and consumed undiluted

within Mississippi, neither the Natural Gas Act nor any action assumed to be taken pursuant to the Act could thereover so divest the jurisdiction of the local Courts in Mississippi to fix the local rates, to appropriately tax as local property, and to hear and determine this question. Compare *Montana-Dakota Utilities Co. v. Northwestern Public Utilities Corp., supra.*

II.

A. We challenge, with deference, respondent's statement, Br. p. 2, as to Docket No. G-1158, see especially *supra* thereasto, and make reference to Sections 12 and 13 of the Formal Complaint therein filed. Note, also, Section 16E, which reads:

> "E. Willmut demands reparations from the date of January 1, 1940, or from such later date as this Commission may award and hereby obligates and binds itself when and if such reparation is thus made, to pass the same on prorata to its customers who have been by said unlawful acts thus damaged."

Willmut challenges as inaccurate the statement, Br. p. 2:

> "Willmut's consistent position in G-1158 was that all gas sold and delivered to it was interstate gas transported through the integrated, interconnected, interstate facilities of United which had been formally certificated by the Commission. * * *."

The customers of Willmut who burned this gas and were charged the $1,000,000 have never been before either court or commission and they are they who are hereunder entitled and Mississippi's Court will not accept a concession of counsel as to the law that will divest these parties' constitutional rights. Compare *Jones v. Madison County*, 72 Miss. 777, 18 So. 87. Throughout the proceedings the differentiation between intrastate gas and interstate gas was

appreciated by Willmut, and judicial power under the common law persisted in Mississippi until March 29, 1956, when administrative jurisdiction first attached. Chapter 372, *Mississippi Laws of 1956.*

While United conceded that the delivery at East Jackson was interstate gas, it was charging the Mississippi Power & Light Company 17.5¢ per Mcf on one side of the street and Willmut 25¢ on the other side of the street for identically the same gas, and generously made a proposition to Willmut that it would at East Jackson reduce the rate to 17.5¢ if Willmut would continue to collect from its customers a rate based on a 25¢ city gate, which Willmut refused to do.

B. The Examiner's opinion speaks for itself and we challenge respondent's interpretation thereof (Br. p. 3).

Petitioner admits that there was but one contract, but the source of the gas was at the election of respondent and it elected to serve intrastate gas, as pointed out in the original petition. Respondent says (Br. p. 3):

> "At the hearing it was proved by Willmut: * * * second, that the gas was a single sale under one contract and was composed of commingled out of state and Gwinville gas save that at East Jackson it was composed only of out of state gas."

This statement, with deference, is inaccurate.

C. We admit that for want of jurisdiction the Examiner and the Federal Power Commission refused either to grant reparations or to make any findings such as were authorized in the *Hope Case, supra*, so that through them United might, in other proceedings, feel the administrative pinch.

We note with interest that the factual background as to the 1/40th of 1% is not controverted in any way; likewise, that the facts as to Christmas are not controverted; likewise, the fact that there was adequate gas in the 16" main wherefrom the intrusion is alleged to have been, to meet the requirements, is not in any way challenged. So with the facts thus admitted—not in dispute (Br. p. 27)—respondent must make the Natural Gas Act cover intrastate gas exclusively. Thus Mississippi's Court has relieved Mississippi's courts from protecting Mississippi consumers as to a natural resource within the State and transferred the onerous burden to the Federal Power Commission and the Federal Courts. The obligation to defend its citizens' rights as to these local matters strongly appertains to the States and they may not be freed therefrom.

United becomes much confused by insisting that this Court should deal with questions of *res judicata* and estoppel which are essentially local in character, and has precluded the State courts from making an appropriate decision as to these strictly local matters. If it be that there is an adjudication controlling or if there be an estoppel as against the customers who are ultimately entitled, that is a matter which the State Court must determine and should be made thus to do; and the State Court is not precluded by the Natural Gas Act from this primary jurisdiction.

United contends that Section 19(b) offered the only method of judicial review, but it is fundamental that if as to this intrastate movement the Federal Power Commission was without jurisdiction, a determination by the Federal Power Commission as to that whereover its jurisdiction was not would be a nullity, especially when as to these matters the dismissal was, not on the merits, but for want of jurisdiction. Compare *Smith* v. *McNeal*, 109 U.S. 426, 27 L.ed. 986; *Murray* v. *Pocatello*, 226 U.S. 318, 57 L.ed. 339;

Annotation, "*Res judicata* effect of judgment dismissing action, or otherwise denying relief, for lack of jurisdiction or venue", 49 *A.L. R. 2d* 1036, 1040; 42 *Am. Jur.*, "Public Administrative Law", Secs. 161, 163, pp. 520, 524; 73 *C.J.S.*, "Public Administrative Bodies and Procedure", Sec. 147, p. 480.

III.

A. United continuously for its own benefit wholly fails to note that this suit is substantially for the benefit of the consumers who have borne the burden of that which is conceded to have been illegal as pointed out in the *Interstate Natural Gas Company Case, supra*; and the power of one suing for the benefit of another to forego and waive that party's rights is a matter whereasto the Supreme Court of Mississippi is the judge when it shall have been freed by this Court from the lack of jurisdiction which it assumed was imposed upon it by the misconstruction of the cases, as shown in the original petition.

Note United claims there was an effort to "separate artificially this single bulk sale of gas" (Br. p. 6), into intrastate and interstate segments. This contract ran for a period of twenty years and was without restriction as to the origin of the gas to be supplied by United to Willmut and if United, as was its right under the terms of the contract, supplied intrastate gas, Willmut was compelled to pay therefor, but when it so did, being intrastate, the relative rights of the parties were governed thereby. The contract was divisible under Mississippi law by reason of monthly payments.

We challenge respondent's interpretation of the Chancery pleadings, with deference, and refer to the pleadings which are more accurately stated in the petition.

C. The facts are as stated in the original petition and not controverted. The gas was not a commingled mass and when respondent seeks to apply that law to the present case it is, with deference, wholly inapposite, a begging of the question.

With deference, we challenge this statement (Br. p. 10):

> "It thus appears that the Presiding Examiner, the Commission and the Supreme Court of Mississippi independently reached identical conclusions resulting in the finding and holding that the single sale of natural gas here involved was solely in interstate commerce *subject to primary and exclusive jurisdiction of the Federal Power Commission,* whereby, the Mississippi Court concluded, beyond the competence of the State Court in respect of damages for any part thereof."

But fortunately this is a Federal question, whereasto decision here must be to prevent confusion as to local rate fixation, local taxation and local court procedure.

The Counter Question is thus stated (Br. p. 10):

> "Where the Federal Power Commission sustaining a purchaser's discrimination complaint under Section 5(a) of the Natural Gas Act adjudicates that the sale of natural gas to such purchaser is, in its entirety, interstate in character and subject to its exclusive jurisdiction (which the Mississippi Supreme Court held also conclusively appeared from this record), does a state court have power to entertain a common law cause for reparations under such purchaser's claim that a portion of such gas delivered under such sale was not interstate, but intrastate in character?"

We answer confidently, for the reasons shown in the petition, that (a) all gas sued for for local consumers was intrastate and none other; (b) the Natural Gas Act could not divest Mississippi's courts' jurisdiction to determine

whether or not gas was interstate or intrastate; and (c) that even if, *quoad* intrastate gas, the Federal Power Commission had adjudged that it was interstate when it in fact was intrastate, that was a question whereasto the Mississippi court would have had a right to adjudge contra, if the Commission had no jurisdiction; and if it found on the facts, then thereasto there might be a final judgment; but when the facts were excluded and not before the Court, no such *res judicata* was potentially possible. We deny specifically that the Federal Power Commission held as claimed. It characterized the gas delivered as intrastate and appropriately so. The Supreme Court of Mississippi, frankly, thoroughly misconceived the decisions of this Court.

IV.

We challenge as inaccurate the statement (Br. p. 11):

> "* * * The Commission, at the behest of Willmut, continued to assert its jurisdiction despite the introduction and commingling of Gwinville gas, reaffirming the completely interstate nature of the sale and its exclusive jurisdiction."

Respondent says (Br. p. 11):

> "* * * The State Court has no power or authority to interfere with such sale nor to entertain any independent or collateral cause of action affecting such sale. * * *."

In addition to the others, the Court's attention is respectfully called to the fact that United has many intrastate rate fixations interspersed along its system and apparently has no published rate for service at New Orleans, Lake Charles, Houston, Dallas, and Austin. The intrastate rates are certainly as low as 14.5¢ per Mcf, as advised by the Railroad Commission, and may be lower.

The differentiation of *McCellan* v. *Montana-Dakota Utilities Company*, D.C. Minn., 104 F.Supp. 46, 204 F.2d 166 (Br. p. 11), is perfectly obvious. Here intrastate gas exclusively under Mississippi sovereignty is sued for in Mississippi's court and the jurisdiction of Mississippi's Court is not ousted by the Federal sovereignty over interstate commerce. Compare *North Carolina* v. *United States*, 325 U.S. 507, 89 L.ed. 1762; *Florida* v. *United States*, 282 U.S. 194, 75 L.ed. 291.

It is true that before the Commission there was an adjudication for purposes of legislatively fixing rates for the future. There was under the case of *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 100 L.ed. 373, no published rate after July 25, 1947, when the contract rate ceased and United breached its agreement whereasto it incurred a damage responsibility.

As to *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 95 L.ed. 912, this is fully dealt with in the petition, pp. 10-15. As to gas moving actually in interstate commerce there can be but the published rate, but here the gas was intrastate whereasto no published rate was required and incidentally no published interstate rate was then applicable.

As to *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, C.A. 5, 162 F.2d 388 (Br. p. 13), the writer lost this case and was thoroughly conversant with it when this suit was instituted and; with deference, it is wholly inapposite.

Natural Gas Pipeline Co. v. *Harrington*, 246 F.2d 915 (Br. p. 13), is not apposite. There was a contract, though not filed, and the rate therein *inter partes* controlled. The Oklahoma Commission was without jurisdiction. Its order was a nullity, and hence disregarded—precisely as will be

any order made by the Federal Power Commission as to strictly intrastate gas. If thereof the Commission is cognizant it will not take jurisdiction. *North Dakota* v. *Federal Power Commission*, C.A. 8, 247 F.2d 173.

Glassberg v. *Boyd*, 116 A.2d 711 (Br. p. 13), is obviously inapposite. Though cited in the Supreme Court of Mississippi it was not regarded there as in any way controlling.

We likewise rely upon *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 98 L.ed. 1035 (Br. p. 14); but while Federal jurisdiction may be, in certain aspects, uniform, under the Bankruptcy Act it does vary from State to State and, where intrastate commerce is involved, the State law is that which is sovereign, unless there be a violation of the equivalent of Section 13.4 of the Transportation Act. *Houston, E. & W. T. R. Co.* v. *United States*, 234 U.S. 342, 58 L.ed. 1341.

Natural Gas Pipe Line Company v. *Panoma Corporation*, 349 U.S. 44, 99 L.ed. 866 (Br. p. 14), is inapposite and insofar as it goes is favorable to petitioner.

Federal Power Commission v. *East Ohio Gas Co.*, 338 U.S. 464, 94 L.ed. 268 (Br. p. 14), has been dealt with *supra*.

We have examined the other cases cited by respondent (Br. p. 14), and, with deference, submit naught therein contra.

The fact that there is an interstate commerce does not destroy intrastate commerce; and United's rate structure is such that, if examined, it will show divers intrastate rates variant from the interstate rates. These excrescences require critical examination in the light of surrounding facts, which the Supreme Court of Mississippi expressly denied Willmut the right to have. Compare *Byrd* v. *Blue Ridge Rural Electric Co-op.*, 356 U.S. , 2 L.ed. 2d 953, where

Mr. Justice Brennan held a party entitled to introduce its own evidence when there had been a correct appraisal of the Natural Gas Act.

We have and do, with deference, rely upon *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 51 L.ed. 553 (Br. p. 15). It is not essential to take away from these customers this $1,000,000 wrongfully collected by United constituting, with deference, a ravishment under color of law whereasto, if potentially possible, rectification must be.

Federal Power Commission v. *Hope Natural Gas Co.*, 320 U.S. 591, 88 L.ed. 333 (Br. p. 15), has been discussed *supra*, and we are dealing here with a right of a Court here in Mississippi to determine whether the gas was intrastate or interstate. Thereasto local policy may have much to do. *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 67 L.ed. 1117.

Interstate Natural Gas Co. v. *Southern California Gas Co.*, C.A. 9, 209 F.2d 380 (Br. p. 15), contains naught contra to that herein contended.

The Federal Power Commission separated this cause after it had been pending on the congested docket of the Commission for nearly five years and all that Willmut could do was to make it not a general rate case but solely a discrimination case, and this with the aid of the Commission staff. Five years' collection of a rate 50% too high is no small matter when it comes from those ratepayers least able to stand such unlawful exactions.

State Corporation Commission of Kansas v. *Federal Power Commission*, C.A. 8, 215 F.2d 176 (Br. p. 16), contains naught contra. That company could have published a rate had it seen fit to do so and its loss was due solely to its own course of conduct, whereas Willmut's customers have no such position.

The time lag has been usually, as pointed out in the present litigation, more than five years, and since the reopening of Docket No. G-1142, G-2019, *et al.*, it may now exceed ten years.

V.

Our answers thereto are:

1. That the Courts of Mississippi have been denied jurisdiction to pass upon the plea of *res judicata* and until the right to be heard is restored it is needless to speculate. When, if and after the misconception of Mississippi's Court has been rectified in this Court, the plea of *res judicata*, which is a local question, can be and will be adequately litigated in the appropriate tribunal. It has no place in the consideration of this writ of certiorari directed exclusively to the exclusion of Mississippians from Mississippi courts to consider a Mississippi transaction in virtue of a Federal law and the action of a Mississippi court in refusing to allow a party suing exclusively for intrastate gas to introduce evidence thereasto. All of these questions are exclusively local questions and no attention can be given them here, but they must be first determined after rectification has been wrought by righting Mississippi's Court's adjudication as to the Natural Gas Act. Mississippi's Court had presented to it by United a second question thus:

> "* * * and, furthermore, this exclusive jurisdiction of the Federal Power Commission has previously been directly invoked by Willmut, relief thereon was obtained by it and consequently res judicata applies."

But Mississippi's Court did not determine that question because it did not reach it by reason of its mis-assumption that there was no jurisdiction in the Mississippi Court—an error arising from its mis-construction of the decisions of this Court.

The quotation from the Examiner's opinion, Br. p. 17, is mis-leading. Respondent should have started the quotation one paragraph before, thus:

> "Accordingly, even if United's rearrangement of its system operations had accomplished a complete substitution of intrastate for interstate deliveries from the Jackson-Hattiesburg line, such unauthorized rearrangement of its system can avail it nothing in this case."

So the Commission was but re-establishing that which United had endeavored to abandon and had abandoned, but its act in so doing was unlawful and continued to be unlawful. That here at issue is, may its unlawful act be made the predicate of the right to retain that which it unlawfully exacted from the customers in Mississippi?

2. As to the question of estoppel against Willmut's customers by its brief, Br. pp. 18, 19, it was conceded that the movement at East Jackson was always a mixture, but nevertheless United charged Willmut 25¢ while charging its competitor across the street 17.5¢.

3. As to the effect of the estoppel by the argument assumed to be quoted of Willmut's counsel before the Federal Power Commission, it is respectfully submitted that this cannot be here considered, as Mississippi's Court must first have had jurisdiction to consider the local question of estoppel; and when it receives the right to proceed in accordance with its Constitution, the answer will be made in such a form as that United may not therefrom profit, for the Commission, where there was an issue as to the rate on a discrimination basis, after the most active litigation, determined *inter partes* that there was a discrimination and adjudged accordingly.

If there be power to consider it, Mr. Poindexter, as to the argument of counsel, answered under oath thus:

"Q. And if on any given day a situation arises such as December 25, 1948, under normal operating conditions for that day, gas will flow from the Jackson-Mobile line into the Jackson-Hattiesburg line?

"A. No sir, because that was not a normal operating condition on December 25, 1948, when gas flowed from the 16-inch back into the 8-inch. That was strictly an abnormal condition."

The relief Willmut obtained from the Commission was under Section 7 of the Act under which the abandonment was prohibited.

4. We can only reiterate that the merits will be fully developed when Willmut is allowed on behalf of its customers to assert its cause of action in the State court.

A. Br. p. 20. With deference, as above shown where there can be no decision on the merits the doctrine of *res judicata* may not in any way apply, and the Commission had no jurisdiction *quoad* reparations.

We do not criticize *Sunshine Anthracite Coal Company* v. *Adkins*, 310 U.S. 381, 84 L.ed. 1263, Br. p. 20.

The decisions cited by respondent, Br. p. 21, simply, with deference, are not apposite where the Commission acted as to the future legislatively to determine a rate; but if it be that this is quasi judicial, then we have collateral estoppel. Compare *Cromwell* v. *Sac County*, 96 U.S. 51, 24 L.ed. 681.

B. Br. p. 21. Estoppel is a State question before a court having jurisdiction. This is an appellate tribunal and that issue has never been tried by the Supreme Court of Mississippi and thereasto it should make a determination as was held appropriate in *United States* v. *Public Utilities Commission*, 345 U.S. 295, 97 L.ed. 1020.

VI.

As to the admeasurement, it was essential that Mississippi's Court have jurisdiction and until rectified argument is useless. We repeat, as to the Northern segment, no interstate gas; as to the Southern segment: no interstate gas after November 1, 1950, and prior thereto only 1/40th of 1% possibly. Can United, voluntarily supplying local gas to these consumers in Mississippi, gouge them by taking away the right of local authorities to fix these rates, to tax this property and to allow recovery in the local courts?

VII.

Counsel say, Br. p. 23:

> "Willmut's position is unreal and untenable".

This we categorically deny.

Counsel's declaration that Mississippi's Court will not "allow damages for any refusal to arbitrate", Br. p. 24, is ill-founded.

It is true that in *Peoples Natural Gas Co.* v. *Public Service Commission*, 270 U.S. 550, 70 L.ed. 726, Br. p. 24, reference was made to non-action by Congress, but as shown by all the cases collected *supra*, the Act was a complement for regulation and did not in any way destroy State power. If this case is no longer the law, with deference, let it be expressly overruled, for it certainly does mislead if it be not as we contend it is when coordinated with the decisions noted *supra*, beginning with the *Hope Case*.

We stand with confidence upon our interpretation of *North Dakota* v. *Federal Power Commission*, and the other cases, Br. p. 25. They speak for themselves. If we have

misinterpreted and the Court allows a sale for requirements where there is no specification for the source of such sale, with a provision such as Section XXII, above quoted, to divest State power over local affairs so that a utility may, notwithstanding the declaration of the purpose of the Act in the *Hope Case*—the curbing of the rapacity of the pipe line companies—to retain this $1,000,000 that belongs to its citizens, then we have no further complaint, but do warn, with deference, that rectification is essential to allow local citizens to sue in matters of this kind and to prevent the flooding of the Federal courts with cases that do not belong there, as well as to preserve intact the local statutes, especially Chapter 372, *Mississipppi Laws of 1956*, and the others, as well as to preserve appropriately the power of taxation. Compare *Detroit* v. *Murray Corporation*, 355 U.S. 489, 2 L.ed. 2d 441, 460.

The Chancery Court of Forrest County had plenary jurisdiction to make a determination as to whether this was intrastate gas or not; and the sole thing that prevented this determination from being made was the holding by Mississippi's Supreme Court that the Natural Gas Act divested all jurisdiction thereasto. The *Abilene Case, supra*, insofar as local intrastate causes of action were concerned, equally preserved them under Chief Justice White's convincing opinion.

Respondent says, Br. p. 27:

> "* * * The facts are undisputed. The only dispute has been as to the legal conclusion to be reached, namely, whether the gas was 'intrastate' or 'interstate'. * * *."

We propound to the Court, with this admission, the question stated in the original petition, with the fullest confi-

dence that this Court, as the sole authority competent to rectify, will do its full duty.

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SUPREME COURT, U. S.

No. 1021

IN THE

Supreme Court of The United States

OCTOBER TERM, 1957

WILLMUT GAS & OIL COMPANY,
Petitioner,

v.

UNITED GAS PIPE LINE COMPANY, C. HUFFMAN LEWIS,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 1021

IN THE

Supreme Court of The United States

OCTOBER TERM, 1957

WILLMUT GAS & OIL COMPANY,

Petitioner,

v.

UNITED GAS PIPE LINE COMPANY, C. HUFFMAN LEWIS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER STATEMENT

I.

RELATIONS BETWEEN UNITED AND WILLMUT

Since 1940, United, a Natural Gas Company, had been delivering gas in interstate commerce to Willmut, a local distributor, at a rate of 30¢ per MCF fixed by Order of the Commission as Rate Schedule No. 48 (R. Ex. Q, Vol. 2, United's Exhibits).[1] On March 20, 1943, in Docket G-148, pursuant to Commission's Order a reduced rate of 25¢ was filed and superseded the 30¢ rate (R. Ex. R-1, Vol. 2, United's Exhibits).

On August 20, 1943, a contract was entered into calling for the rate of 25¢ per MCF, with delivery of gas to be

[1] Filed with this Court in original form by Willmut were United's exhibits.

made by United to towns, cities and farm taps serviced by Willmut, which was filed and approved by the Commission as Rate Schedule No. 73. These deliveries were made along a 90 mile stretch of United's system, the northern point of delivery being East Jackson, and the southern point being Hattiesburg, both in Mississippi. This 90 mile line was a part of United's integrated, interconnected system which extended over several states, and through which gas from Texas, Louisiana and Mississippi was transported interstate to various points in said states and also to Alabama and Florida.

II.

DOCKET G-1158 BEFORE THE COMMISSION

A. Background and Contentions of Parties.

On August 5, 1947, United contracted with Mississippi Power & Light Company, the local distributor in Jackson, Mississippi, for a rate of 17½¢ per MCF. This contract was approved by the Commission and became the filed rate (R. 21, 202).

In 1948, in Docket G-1158, Willmut filed a Complaint pursuant to Section 5(a) of the Natural Gas Act (R. Ex. A, Vol. 1, United's Exhibits), asserting that its contract rate of 25¢ was preferential and discriminatory in view of the 17½¢ rate at Jackson, and prayed: that the Commission exercise its jurisdiction; that it determine the reasonable rate for the future, define the discriminatory period and grant reparations.

Willmut's consistent position in G-1158 was that all gas sold and delivered to it was interstate gas transported through the integrated, interconnected, interstate facilities of United which had been formally certificated by the Commission. Further, that this sale was a single sale under one

contract within the exclusive jurisdiction of the Commission.

United contended it had rearranged its facilities so that it was currently serving gas to Willmut from the Mississippi Gwinville gas field, that such was intrastate gas and therefore not subject to the jurisdiction of the Commission. United conceded, however, that the delivery to Willmut at East Jackson was entirely interstate gas (R. Ex. B, Vol. 1, United's Exhibits).

B. The Examiner's Decision.

At the hearing it was proved by Willmut: first, that United had not obtained authority to abandon its interstate service; second, that the gas was a single sale under one contract and was composed of commingled out of state and Gwinville gas save that at East Jackson it was composed only of out of state gas.

The Examiner (R. Ex. C, Vol. 1, United's Exhibits) adjudicated: that the sale to Willmut was a single bulk sale made under one contract; that the out of state gas delivered at East Jackson as well as the commingled out of state and Gwinville gas delivered at other points was solely interstate; that the introduction of local gas did not destroy or change the interstate character of this single sale under one contract; that the proportion of out of state and Gwinville gas was immaterial; that United had not obtained permission to abandon the sale of interstate gas or to rearrange its system as was done; that even after such rearrangement the line was interconnected with the remainder of United's interstate pipe line system by a valve which acted automatically by the rise and fall of line pressure; that the Jackson-Hattiesburg line served two essential functions in United's coordinated pipe line network, (1) it provided a means by which continuous and adequate gas service was

automatically assured all delivery points, regardless of whether gas was produced within or without the State, and (2) it transported in interstate commerce not only out of state gas but also gas originating in the Gwinville Field to points in Mississippi, Alabama and Florida. Further that the single bulk sale to Willmut was a sale solely in interstate commerce, subject to the exclusive jurisdiction of the Commission, and nothing had transpired to destroy such exclusive jurisdiction. Finally, that neither reparations nor damages could be granted under the Natural Gas Act, nor the lawfulness of past rates determined, but the Examiner ordered United for the future to sell at the 17½¢ rate instead of the former 25¢ rate.

C. The Commission Affirmed the Examiner.

The Examiner's decision was reviewed by the Commission and, upon express consideration, affirmed (R. Ex. D, Vol. 1, United's Exhibits). Specifically, the idea of reparations was rejected and the Commission refused to determine the lawfulness of past rates. As to jurisdiction, the Federal Power Commission held that United was a natural gas company within the meaning of the Act:

> "It is engaged in the transportation and sale for resale of natural gas in interstate commerce. It transports by means of its integrated pipe line system natural gas produced from fields in Texas, Louisiana, and Mississippi and delivers and sells it to industrials, other pipe lines, and distribution companies, including Willmut, in the foregoing states and also in Alabama and Florida." (at p. 5, 6.)

Also,

> "As we have seen, United conceded that the sale to Willmut was one 'in interstate commerce' for resale and subject to regulation prior to that date. The cir-

cumstance that only a relatively small amount of gas has moved in the line since then is a direct consequence of the system rearrangements made by United without the permission required by Section 7(b). The Commission's plenary jurisdiction over the Willmut sale is unaffected by those unauthorized system rearrangements. The quantity of interstate gas delivered under presently existing conditions is therefore immaterial. In any event, as Pennsylvania Water & Power Company v. Federal Power Commission, 343 U.S. 414, cited by the Examiner, holds, Federal rate authority applies to all electricity sold despite the fact that it is made up of interstate energy, together with that locally produced." (at p. 15.)

Willmut sought rehearing, reiterating its position that the Commission had jurisdiction but again demanding reparations (R. Ex. E, Vol. 1, United's Exhibits). United also asked for rehearing (R. Ex. F, Vol. 1, United's Exhibits). Both were denied.

Section 19(b) of the Natural Gas Act offered the only method of judicial review. Neither United nor Willmut appealed. Thus, the Order became final.

Complying, United began serving Willmut at the 17½c rate. Shortly thereafter United filed notice of increase of rates to 25c to both the Jackson distributor and to Willmut.[2]

III.

PROCEEDINGS IN THE STATE COURTS

A. In the Chancery Court, #16,244.

In 1953, Willmut filed this suit (R. 4) against United in the Chancery Court of Forrest County, Mississippi, setting up the same facts it had enumerated in G-1158 and asked

[2] This increase proceeding with other proceedings resulted in agreed settlement rates accepted by Willmut and approved by the Commission. Opinion 277, 13 FPC .

such State Court to award reparations. The only material difference between the Complaint filed with the Commission and the Complaint in the Chancery Court is in Willmut's effort here to separate artificially this single bulk sale of gas, and to recover damages only as to that part of the gas which originated in the Gwinville Field. Thus, the reparations sought in the State Court duplicated the reparations sought in G-1158.

United filed its Motion to Dismiss and Bar Pleas (R. 168) on the grounds, inter alia, that the issues posed by Willmut had been submitted to, and decided by, the Federal Power Commission; that the jurisdiction of the Commission is patently exclusive; that the State Courts obviously are without power and authority to grant reparations or damages on a sale for resale of natural gas in interstate commerce; that the Natural Gas Act itself does not permit the awarding of reparations; and the Commission's Order is necessarily res judicata.

B. Chancery Court's Decision.

The Motion to Dismiss and the Bar Pleas were all argued together along with Willmut's Demurrers to the Bar Pleas and its Motions to Strike the Motion to Dismiss. The Chancery Court sustained Willmut's Demurrers to the Bar Pleas and its Motion to Strike the Motion to Dismiss and also held that United's Motion to Dismiss should be overruled (R. 398). Further, it held that the Bar Pleas were insufficient in law. The effect of this decision was to hold that the Chancery Court had jurisdiction, could award reparations, and that res judicata did not apply.

C. Decision of State Supreme Court.

The State Supreme Court, after detailing the facts posed two questions for decision, the first being: "whether the

Federal Power Commission had power to regulate the rates charged by United for natural gas sold Willmut, both as to that locally produced as well as that transported into the State" (Pet. App., 7a).

As to this question, the Court held:

> "United operated a unified system enterprise which was interstate in character. The pipeline employed to serve Willmut with natural gas was an integral part of United's interconnected interstate system, all of which was duly certificated by the Federal Power Commission. The unauthorized system changes made by United in 1947, which largely, but not entirely, restricted the flow of natural gas to Willmut to local gas produced at the Gwinville Field, was ineffectual insofar as the jurisdiction of the Federal Power Commission was concerned. In addition to the fact that some interstate gas continued to commingle with the local gas supplied Willmut, the natural gas transported from without the State was available at all times to completely or partially supply the natural gas requirements of Willmut when the locally produced gas became for any reason unavailable or insufficient; and the pipes were so connected that such flow of interstate gas would automatically take place. There was but one sale by United to Willmut under one contract covering all gas sold and delivered at one price schedule which was on file with the Federal Power Commission. The commingled natural gas thus sold and delivered to Willmut was 'in interstate commerce' subject to the regulating power of the Federal Power Commission. Pennsylvania Water & Power Co. v. Federal Power Commission, 343 U.S. 414, 96 L. Ed. 1042, 72 S. Ct. 843; Connecticut Light & Power Co. v. Federal Power Commisssion, 324 U.S. 515, 89 L. Ed. 1150, 65 S. Ct. 749; Wisconsin-Michigan Power Co. v. Federal Power Commission, 197 F. 2d 472 (CCA 7). And at Willmut's request the Federal Power Commission did assert its power over the entire sale of natural gas to Willmut." (Pet. App. 7a-8a.)

The second question was: "whether Willmut can maintain a common law action for the recovery of the difference between the discriminatory rate charged by United and a just and reasonable and non-discriminatory rate for that part of the natural gas sold which was produced, transported and sold in the State of Mississippi" (Pet. App. 8a).

In answer to this question, the State Court said:

> "... Willmut contends that since the Federal Power Commission had no power to award reparations for past charges, and could only require United to file a rate schedule thereafter to be charged, that the sovereignty of the State to apply its common law and award reparations was not abrogated by the Natural Gas Act. In effect, Willmut contends that the matter of reparations was a field left open by Congress when it failed to give the Federal Power Commission power to award reparations for past charges.
>
> "We have concluded that all of the natural gas sold Willmut was subject to the jurisdiction of the Federal Power Commission; thus it was all 'in interstate commerce' as far as this second question is concerned. The problem is whether it is open for the courts to determine what the reasonable rates during the period prior to the Federal Power Commission's order should have been. The Supreme Court of the United States said in Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 95 L. Ed. 912, 341 U.S. 246:
>
> "'Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

"'We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable.'

"The power of the Federal Power Commission to regulate the price paid for natural gas transported and sold for resale in interstate commerce is exclusive, and such price is not subject to state regulation. Natural Gas Pipeline Co. of America v. Panoma Corp., et al., 99 L. Ed. 866, 349 U.S. 44. In Mississippi Power & Light Company v. Memphis Natural Gas Co., 162 F. 2d 388 (CCA 5) . . . [t]he effect of the decision . . . is that the rate schedule on file with the Federal Power Commission is the only lawful rate insofar as past rates are concerned. Cf. Glassberg v. Boyd, 116, Atl. 2d 711.

"When a sale of natural gas is subject to the power of the Federal Power Commission, or when the Commission exercises its power in a case where it has discretion, (cf. Conn. Power & Light Co. v. Federal Power Commission, supra) its jurisdiction is full and exclusive. It is not for a court to say whether Congress gave the Federal Power Commission too much or too little power over the subject of rate regulation, or whether the remedy afforded a party in a given case is complete or inadequate, measured by judicial standards.

"The jurisdiction of the Federal Power Commission having attached to all natural gas sold to Willmut, there is no residual jurisdiction for independent court action. The local component lost its intrastate character and there remained no power in the courts to apply the common law of the State" (Pet. App. 9a-10a).

Thereupon the Court reversed and dismissed the suit stating:

". . . On interlocutory appeal we ordinarily remand the case to the trial court, but in this case no additional or amended pleading could enable Willmut to maintain

its suit. It would serve no purpose to remand the cause, and final judgment will be rendered here dismissing the bill. Parker v. Board of Supervisors, 125 Miss. 617, 88 So. 172.

"Reversed and Bill Dismissed.

"All Justices Concur" (Pet. App. 11a).

The Supreme Court overruled Willmut's Suggestion of Error, one Justice dissenting on the procedural ground that Remand with instructions, rather than Dismissal, should be ordered (Pet. App. 11a).

COMMENT: It thus appears that the Presiding Examiner, the Commission and the Supreme Court of Mississippi independently reached identical conclusions resulting in the finding and holding that the single sale of natural gas here involved was solely in interstate commerce subject to the primary and exclusive jurisdiction of the Federal Power Commission, whereby, the Mississipppi Court concluded, beyond the competence of the State Court in respect of damages for any part thereof.

COUNTER QUESTION

Where the Federal Power Commission sustaining a purchaser's discrimination complaint under Section 5(a) of the Natural Gas Act adjudicates that the sale of natural gas to such purchaser is, in its entirety, interstate in character and subject to its exclusive jurisdiction (which the Mississippi Supreme Court held also conclusively appeared from this record), does a state court have power to entertain a common law cause for reparations under such purchaser's claim that a portion of such gas delivered under such sale was not interstate, but intrastate in character?

ARGUMENT

IV.

EXCLUSIVE JURISDICTION OF FEDERAL POWER COMMISSION APPEARING, COURTS WITHOUT COMPETENCE RESPECTING REPARATIONS

United's sale to Willmut, from the beginning, has been under the direct supervision and regulation of the Federal Power Commission. Its original rate to Willmut was filed with and approved by the Commission, and was subsequently reduced by the direct application of the power of the Commission in early 1943. The contract between Willmut and United in the same year was had only after submission to and approval by the federal regulatory authority. And in G-1158 this rate schedule was subsequently altered and changed by said Commission on the solicitation of Willmut. The Commission, at the behest of Willmut, continued to assert its jurisdiction despite the introduction and commingling of Gwinville gas, reaffirming the completely interstate nature of the sale and its exclusive jurisdiction.

The sale of gas to Willmut by United was a sale in interstate commerce and consequently was subject to the exclusive jurisdiction of the Federal Power Commission. The State Court has no power or authority to interfere with such sale nor to entertain any independent or collateral cause of action affecting such sale. The law on this subject is clear, convincing and complete and cannot be contravened or contradicted.

The case of *McClellan* v. *Montana-Dakota Utilities Company* (D.C. Minn., 1952), 104 F. Supp. 46, 204 F. 2d 166, cert. den. 346 U.S. 825, presents a situation strikingly similar to the case at bar. There, the Plaintiff in 1941, petitioned the Commission to reduce the rates charged it by defendant, a natural gas company. In 1946, the Commission

ruled that the rates were discriminatory and fixed the rate for the future. Plaintiff brought this suit in the District Court to recover as damages the difference between the rates paid Defendant and the new rate fixed by the Commission. "... [H]aving secured such a [Commission] determination, it claim[ed] the right to proceed with its action for damages and ask[ed] the Court to take judicial notice that the rates declared to be unlawful in 1946 and 1948 would have been unlawful in the period during which the losses occurred. . . ." (104 F. Supp. at 49).

The Court held that where natural gas rates are filed with the Commission, they become the only lawful rates which the utility can charge or accept, and, until changed by the Commission, are binding upon the plaintiff and defendant alike and upon the Court. Further, that damage could be proved only by showing the Commission would have approved some rate structure other than that existing. But "the plaintiff cannot make its assault on a matter said not to be within the jurisdiction of the Commission, when adjudication must turn on matters which are within its jurisdiction." (104 F. Supp. at 52.)

It is obvious in the case at hand, that Willmut wants to rely upon an adjudication by the Commission in G-1158 of discrimination as to interstate gas, which was within its jurisdiction, in order to make a case on gas which Willmut now claims was intrastate and not within the jurisdiction of the Commission. But, as *McClellan* teaches, this cannot be done.

In *Montana-Dakota Utilities Company* v. *Northwestern Public Service Company*, (1951) 341 U.S. 246, 251, cited in *McClellan, supra*, this Court said:

> "Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the

qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

"We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable."

McClellan cited *Mississippi Power and Light Co.* v. *Memphis Natural Gas Co.*, (1947), 162 F. 2d 388, cert. den. 332 U.S. 770. There the Fifth Circuit held: that the contract rate filed with the Commission was the legal rate; that rate-making is a legislative function; that the Courts will not interfere therewith; that to give effect to the "favored nation" clause would transfer the legislative function of rate-making from the Commission to the courts; and, if hardships result, supplication for further relief must be addressed to the Congress.

The latest expression of the Federal Judiciary on this subject is that by the same Court in *Natural Gas Pipeline Co. of America* v. *Harrington*, (1957), 246 F. 2d 915, 918, cert. den. (May 19, 1958) Nos. 803, 901, October term, 1957, wherein it stated: " . . . the Federal Power Commission by its order . . . spoke for the future only, and did not possess the power enjoyed by the Interstate Commerce Commission . . . of looking into the past and ascertaining the facts. Nor does any court possess such power for the purpose of fixing retroactively a just, reasonable and lawful rate."

In *Glassberg* v. *Boyd*, (1955), 116 Atl. 2d 711, the Delaware court asserted that since Congress intended that

neither the Commission nor the courts should have power to grant reparations, there is no residual jurisdiction remaining for independent court action.

In *Phillips Petroleum Company* v. *Wisconsin*, (1954), 347 U.S. 672, this Court held the jurisdiction of the Commission was not intended to vary from state to state depending upon the degree of state regulation and of state opposition to federal control.

Natural Gas Pipe Line Company v. *Panoma Corporation*, (1955), 349 U.S. 44, dealt with the attempt of Oklahoma to fix a minimum price to be paid for gas after production and gathering had ended. Relying on *Phillips*, this Court held "that such a sale and transportation cannot be regulated by a state but are subject to the exclusive regulation of the Federal Power Commission" (p. 45).

Federal Power Commission v. *East Ohio Gas Company*, (1950), 338 U.S. 464, declared that once a company is properly found to be a "natural gas company", no state can interfere with federal regulation thereof.

To like effect: *Illinois Natural Gas Company* v. *Central Illinois Public Service Company*, (1942), 314 U.S. 498; *United States* v. *Public Utilities Commission of California*, (1953), 345 U.S. 295; *Michigan Consol. Gas Co.* v. *Panhandle Eastern Pipe Line Company*, (6 Cir. 1949), 173 F. 2d 784; *Public Service Commission of Kentucky* v. *Kentucky Natural Gas Corporation*, (6 Cir. 1941), 119 F. 2d 417; *Citizens Gas Users Association* v. *Ohio Public Utilities Commission*, (1956), 165 OS 536, 138 N.E. 2d 383.

Obviously it is essential for there to be one national authority to govern, regulate, determine and fix rates for the delivery and sale of interstate natural gas for resale. It is equally indispensable for such authority to be exclusive. Only by a uniform standard of rate regulation can there be certainty and equality to all. Uniformity could not

be had and definitely could not be maintained were the rates to be subject to alteration by the various courts or regulatory bodies in the forty-eight states, either by direct action or by indirect attack under the guise of the recovery of reparations as damages so as to prevent discrimination. It is easy to imagine the chaotic confusion that would so quickly result from such interference no matter how well meaning.

In *Watab Paper Co.* v. *Northern Pacific Railway Co.* (8 Cir. 1946), 154 F. 2d 436, to the argument that the Minnesota statute preserved the common law remedy for the recovery of unreasonable charges because of a reservation in the Minnesota statute, the court quoted from *Abilene,*[3] as follows:

> "This clause (preserving the common law remedy) however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself" (p. 438).

Federal Power Commission v. *Hope Natural Gas Company* (1944), 320 U.S. 591, 617, states:

> "Congress has entrusted the administration of the Act to the Commission not to the courts. Apart from the requirement of judicial review it is not for us to advise the Commission how to discharge its functions."

In *Interstate Natural Gas Company* v. *Southern California Gas Company* (9 Cir., 1953), 209 F. 2d 380, the Court was asked to require defendant to transport through its pipelines gas belonging to plaintiff, and to fix the volume and rate. This the Court refused to do, since primary jurisdiction was vested in the Commission and not the Courts,

[3] *Texas Pacific Ry. Co.* v. *Abilene Cotton Oil Co.* (1907), 204 U.S. 553

and this primary jurisdiction existed even though the natural gas company either failed or refused to file a tariff with the Commission.

From a practical standpoint, the methods afforded by the Act are sufficient to furnish proper remedy to all parties. Willmut had a perfect right the moment it felt it was being charged an unjust rate to apply for and obtain complete relief at the hands of the Commission. It did take advantage of this opportunity. It did obtain redress in that a different rate was put into effect on the basis of its petition. We might simply point out that for reasons best known to Willmut, it neglected to file its petition until 1948 although it might have done so in 1947. Likewise, Willmut, for reasons satisfactory to it, requested that its petition be consolidated with a general rate investigation then pending. Here again, delay occurred. When four years later, Willmut concluded of its own volition, and which was earlier available to it, to ask for a hearing on its petition alone, such was immediately granted and promptly disposed of by the Commission.

A delay of this type is not one that works solely against the purchaser like Willmut. It also applies to a seller as is vividly illustrated in *State Corporation Commission of Kansas* v. *Federal Power Commission* (8 Cir., 1954), 215 F. 2d 176. In this case Northern Natural suffered a loss of some $3,000,000 because the rate on file with the Commission was too low. Northern undertook to obtain reparations for this loss at the hands of the court. Just as firmly as has been held in the foregoing cases, the court disposed of its contentions, declaring: the Commission can only fix rates prospectively; the Commission lacks power to grant reparations even though a rate proves to be confiscatory; the Courts are limited strictly to the exercise of judicial review and cannot fix rates or accord reparations on account of insufficiency of rates in the past. In the process of rate

regulation the Commission determines the lawfulness of the rate and it is this determination that is subject to review by the court. There is no place in the proceeding for either the Commission or the court to award reparations.

So we find that not only the purchaser has to endure the inconvenience of following the statutory procedural course but so does the Seller, even though he may be disposing of his commodity below its value. Under ordinary circumstances the time lag is of little consequence where the parties avail themselves promptly of their remedy under the Natural Gas Act.

V.

THE MATTER IS RES JUDICATA AND WILLMUT IS ESTOPPED FROM CONTENDING TO THE CONTRARY

This record affirmatively shows, and the Mississippi court held, that the issue of whether this was an interstate or intrastate sale of gas was submitted to and decided by the Commission, whose decision became final.

Willmut filed its Complaint with the Commission alleging that this single sale was a sale in interstate commerce subject to the exclusive jurisdiction of the Commission. United, in that proceeding, alleged it was an intrastate sale because it had altered (or attempted to alter) its system to use local gas. This was the first and prime issue in the hearing. The Examiner listed it as the No. One Question thusly:

> "(1) Is United's sale to Willmut 'in interstate commerce' so as to be subject to regulation under the Natural Gas Act?" (R. Ex. C, p. 8, Vol. 1, United's Exhibits).

In discussing this basic jurisdictional question the Examiner held:

> "It is clear, however, that United, notwithstanding the operational changes made, has not succeeded in

removing any part of its sale to Willmut from Commissio. regulation. It serves Willmut under a single contract effective as a rate schedule since August 20, 1943; the service provided under that contract is considered as one bulk sale; the deliveries made at East Jackson from the Sterlington-Jackson line are comprised of interstate gas; and the deliveries from the Jackson-Hattiesburg line since February 6, 1947 have involved relatively small amounts of interstate gas, but may at any time involve much larger volumes of interstate gas by the automatic operation of United's system. In such a situation, control of United's rate to Willmut is a matter with which Congress alone is competent to deal, and is one over which the Commission has regulatory power under the Natural Gas Act" (R. Ex. C, p. 24, Vol. 1, United's Exhibits).

On review, the Commission upheld the Examiner, finding that United was a natural gas company engaged in the transportation and sale for resale of natural gas in interstate commerce, transporting by means of its integrated pipe line system natural gas produced in Texas, Louisiana and Mississippi and delivering and selling it in the foregoing states and also in Alabama and Florida. Also, it stated that *Pennsylvania Water & Power Company* v. *Federal Power Commission* (1952) 343 U.S. 414, holds that Federal rate authority applies to all electricity [gas] sold despite the fact that it is made up of interstate energy, together with that locally produced.

How strongly Willmut urged upon the Commission that this was a single unit sale in interstate commerce (a position directly contrary to the position now being taken) is disclosed in the following excerpts from its brief to the Commission:

"(b) Full jurisdiction is vested in this Commission under the Act as to, not alone the gas originating out-

side of Mississippi, but as well and as completely the gas originating in Mississippi, when as a unit the same is delivered to Willmut at its city gate in East Jackson. In short, the interstate and intrastate having been voluntarily commingled by United, and thereasto a rate published under the Act, that rate being required to be just, reasonable and non-discriminatory, embraces within the Commission's power all and every part of the intrastate gas so thus concurrently delivered" (R. Ex. D-1, Vol. 1, United's Exhibits).

And:

"When United voluntarily commingled interstate gas with intrastate gas, creating thereasto a confusion of goods and then delivered that thus commingled, all so thus received by Willmut was within the protection of the Act" (R. Ex. D-1, Vol. 1, United's Exhibits).

In the oral argument before the Examiner, Willmut's counsel ridiculed the idea that this sale was composed of anything but interstate gas (Vol. 5, p. 650, 651, G-1158).[4] We quote:

". . . And you will find, if your Honor please, that the gas pressure in the 16-inch line is higher than the gas pressure in the 8-inch line, and with that connection between the two parties United has seen fit not to install a check valve whereby the intrastate gas may be kept in, but it has installed, if your Honor please, a flow valve, whereby, when pressure is needed at Hattiesburg, it can come in from the 16-inch line or when it is in excess there at Hattiesburg it can go out. In other words, our friends have gotten installed consciously and purposely at the South end of this line under the certificate of convenience and necessity a flow valve, and the gas moves in and out at its pleasure, as Boyle's Law doth regulate.

[4] A complete set (Volumes 1 through 6) of the transcript of the hearings and oral argument before the Federal Power Commission in G-1158 were filed with this Court and constitute a part of the record.

". . . And therefore when they utilized as an essential element an equalizing valve, as your Honor's kind suggestion was, at that point, our friends can't support the declaration which they made here, apparently without question, that nobody questions that all of this gas had been intrastate gas from that time until now. It just ain't a fact, your Honor, with deference. It just ain't a fact.

"So that when we have this inflow and this outflow, as the gas law does require, with deference, that is interstate gas."

Having thus firmly established jurisdiction in the Commission and having obtained relief predicated thereon but not being successful in obtaining reparations, Willmut then brought this suit in the State Court seeking the identical reparations in part. It simply rearranged its Formal Complaint in G-1158, asserting however that it was only seeking to obtain damages at the hands of the State Court on the gas originating in the Gwinville Field which it then, for the first time, labels "intrastate gas."[5] This complete reversal of position, United contends, cannot be done. First, as has been shown, exclusive jurisdiction of this single unit sale of gas is vested in the Commission and the courts have nothing to do with it. Second, the Commission's adjudication of its jurisdiction is conclusive and is res judicata. Third, Willmut is now estopped, having successfully carried to victory the exact opposite position.

A. The matter is res judicata.

Although supported by numerous cases, the leading decision on this point is *Sunshine Anthracite Coal Company* v. *Adkins*, (1940), 310 U.S. 381. There, jurisdiction rested on whether the coal was "Bituminous Coal." The Commis-

[5] At Record page 374 is a typed comparison of the two complaints and the identity of the allegations is there prefectly visible.

sion, after hearing, held that it was. Suit was then filed in the District Court and the same issue was tendered. A plea of res judicata was sustained upon the unequivocal holding that the Commission was authorized to determine this fact upon which jurisdiction rested and such determination bound the parties. It was also pointed out that the lower court correctly held that it had no jurisdiction to determine this fact since Congress had created, for this purpose, a procedure under the Regulatory Act and "that remedy is exclusive" (p. 404).

Additional decisions to the same effect: *Adams* v. *Nagle*, (1938) 303 U.S. 532; *Butte Railway* v. *United States*, (1933) 290 U.S. 127; *Hagens* v. *United Fruit Company* (2d Cir. 1943) 135 F. 2d 842; *Dennison* v. *Payne*, (2d Cir. 1923), 293 F. 333; *Pillsbury* v. *Alaska Packers Association* (9 Cir. 1936), 85 F. 2d 758, rev. on other grounds, 301 U.S. 174; *Texas Steel Company* v. *Fort Worth*, (1931), 120 Tex. 597, 40 S.W. 2d 78; *West* v. *Standard Oil Company*, (1929), 278 U.S. 200; *Borax Consolidated* v. *Los Angeles*, (1935), 296 U.S. 10; *Zimmerman* v. *Scandrett*, (D.C. Wis. 1944), 57 F. Supp 799; *Dredge and Dock Company* v. *Brown*, (D.C. Ill. 1930) 47 F. 2d 265; *Doey* v. *Howland Company*, (1918) 224 N.Y. 30, 120 N.E. 53, cert. den. 248 U.S. 574.

Similarly, in other analogous factual situations, the Courts have reached the same conclusion. *Miles Laboratories* v. *Federal Trade Commission*, (D. C. Cir. 1944) 140 F. 2d 683, cert. den. 322 U.S. 752; *Yakus* v. *United States*, (1944) 321 U.S. 414.

B. Willmut is Estopped.

The Supreme Court of Mississippi has consistently condemned and has refused to permit a party litigant to abandon a position successfully enforced and to adopt a contrary one when it appears advantageous for him to do so.

As it stated in *Smith* v. *Smith*, (1951) 211 Miss. 481, 52 So. 2d 1:

> "We do not think that the appellants can 'blow hot' in 1947 as to the validity of the tax sale, and then 'blow cold' on the same proposition in the same court in 1949. They are estopped to question its validity under the facts here presented" (p. 6).

To like effect see *Logan* v. *Smith*, (1956) ..... Miss. ....., 91 So. 2d 707.

Federal Courts apply the same rule. *Callanan Road Improvement Co.* v. *United States* (1953) 345 U.S. 507, 513; *Davis* v. *Wakelee* (1895) 156 U.S. 680, 689; *Scarano* v. *Central R. Co. of New Jersey* (3 Cir. 1953) 203 F. 2d 510, 512-3; *Jamison* v. *Garrett* (D.C. Cir. 1953) 205 F. 2d 15, 17; *Chicago S. S. & S. B. R. R.* v. *Fleming* (7 Cir. 1940) 109 F. 2d 419, 420.

VI.

EXCLUSIVE FEDERAL JURISDICTION NOT AFFECTED BY THE PROPORTION OF OUT OF STATE AND LOCAL GAS

This Court has soundly repudiated the untenable theory that Federal Jurisdiction can be exclusive only if the volume of the interstate commodity or commerce exceeds the local component, as well as the equally unsound theory that such jurisdiction fails where the interstate component exists only in small quantities. The Commerce Clause was never so conditioned. There is no need to labor this point, which has so clearly been the subject of so many decisions. See *Connecticut Light and Power Company* v. *Federal Power Commission*, (1945) 324 U.S. 515; *Pennsylvania Water and Power Co.* v. *Federal Power Commission*, (1952) 343 U.S. 414; *Jersey Central Power and Light Company* v. *Federal Power Commission*, (1943) 319 U.S. 61; *Wisconsin-Michi-*

gan Power Company v. *Federal Power Commission*, (7 Cir. 1952) 197 F. 2d 472, cert. den. 345 U.S. 934; *State of Wisconsin* v. *Federal Power Commission*, (D.C. Cir. 1952) 201 F. 2d 183, cert. den. 345 U.S. 934; *California Electric Power Company* v. *Federal Power Commission* (9 Cir. 1952) 199 F. 2d 206, cert. den. 345 U.S. 934. De minimis presented no problem to Willmut before the Commission. It presents none here.

VII.

WILLMUT'S POSITION IS UNREAL AND UNTENABLE

Willmut's position endorsed and joined in by the amicus City of Hattiesburg is utterly without foundation either at law or in logic, because it completely ignores immutable devastating facts as conclusively demonstrated herein:

1. That the presiding Examiner, the Commission and the Mississippi Court, all adjudicated that the Commission had exclusive jurisdiction of the subject matter of this case.

2. That the Examiner, the Commission and the Mississippi Court all adjudicated that all gas sold to Willmut comprised a single sale of interstate gas and that there was no "intrastate gas."

3. That the Gwinville gas was only a commingled part of this single bulk sale, was interstate gas from the time of its introduction into United's line and such interstate character was insisted upon by Willmut and so adjudicated by the Examiner, the Commission and the Mississippi Court.

4. That the Mississippi Court held that since all gas sold in this single sale was interstate in character and thus subject to the exclusive jurisdiction of the Commission, there was no residual power left in the state to hear and deter-

mine a damage suit for reparations for past periods growing out of the interstate sale. Indeed petitioner and the amicus so recognize and confess.

Willmut and its amicus merrily build their house of cards on the fanciful assertion that this suit involves only "intrastate gas." Such an unwarranted assumption is completely unfaithful to the record and flies drastically into the teeth of the previous adjudications and all of the decisions. Having bottomed and built on this false foundation, their theories subsequently spun thereon transgress reality.

As to arbitration, here again Willmut strikes out into fairyland, blandly ignoring the fact that:

A. Willmut is now suing on an alleged common law cause of action in the Mississippi Court, but the Mississippi Court will not enforce an agreement to arbitrate nor will it allow damages for any refusual to arbitrate. *Machine Products Company* v. *Prarie Lodge* (1957), 94 So. 2d 344 (not officially reported). As to this, Mississippi law is controlling.

B. Even assuming that Mississippi law would permit the enforcement of arbitration, nonetheless Willmut here can derive no comfort from the *Mobile* and *Memphis* cases[6] (Pet 27, 29) since Willmut itself completely by-passed and eliminated arbitration by seeking and obtaining the use of the power of the Commission to fix and determine the rate and the rate is the only item contemplated to be the subject of the alleged agreement to arbitrate.

Willmut apparently places great emphasis on the case of *Peoples Natural Gas Co.* v. *Public Service Commission* (1926), 270 U.S. 550. Willmut ignores the fact that therein the Court specifically noted that Congress had not exercised

[6] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.* (1956), 350 U.S. 332; *Memphis Light, Gas & Water Div.* v. *Federal Power Commission* (D.C. Cir., 1957), 250 F. 2d 402, cert. granted No. 691, Oct., 1957 term.

its paramount power to regulate under the Commerce Clause.

In *Pennsylvania Water*, where the paramount power had been exercised, the losing parties bottomed their position on *Peoples* and its theory, which this Court directly rejected.

North Dakota v. *Amerada Petroleum Corporation* (8 Cir. 1957), 247 F. 2d 173, is not in point. There was not a sale for resale of gas in interstate commerce under any theory. There was not a single sale under one contract before the Court; but two separate sales: one in interstate commerce and filed with the Commission; the other in intrastate commerce and, of course, never filed. The Commission refused to take jurisdiction over the unfiled, separate, intrastate sale.

A casual reading of the *Hastings* cases and *Humble*[7] (Pet. 17-8), show the facts to be totally dissimilar.

Petitioners and the amicus distort the holding of *Montana-Dakota* (Pet. 14, 15; Am. br. 5, 7, 11). There reparations for past periods were sought. The majority held that no federally cognizable cause was stated because, inter alia, the Federal Power Act denied such a right. On this point the dissent agreed for it stated, " . . . Congress did not intend either court or Commission to have the power to award reparations on the ground that a properly filed rate or charge has in fact been unreasonably high or low. If that were all the complaint before us showed, we would agree that recovery of damages in a civil action would not be an appropriate remedy, and that the complaint should have been dismissed" (p. 258).

The difference between the majority and the dissent pivoted upon the view of the dissent that the allegations of

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[7] *City of Hastings* v. *Federal Power Commission* (D. C. Cir., 1955), 221 F. 2d 31, cert den. 349 U.S. 920; *City of Hastings* v. *Kansas-Nebraska Natural Gas Co., Inc.* (8 Cir., 1955), 226 F. 2d 419; *Humble Oil & Refining Co.* v. *Texas & Pacific Ry. Co.* (1955), Tex. , 289 S.W. 2d 547.

fraud and deceit allegedly prevented proper disclosure to the Commission of facts which would have produced Commission disapproval, prevented access to the Commission, and appealed to the court's equitable power in such way as to authorize a reference to, and investigation by, the Commission. These considerations do not appear here.

The conflict imputed to *Montana-Dakota*, and *Davidson* and *T.I.M.E.* (Pet. 10-11, 19); Amicus Br. 10-11), does not exist. They, unlike *Montana-Dakota*, were not suits for reparations for past periods. They were contract actions under the Tucker Act (thus Federally cognizable) for debt. The defense denied indebtedness because of unreasonableness in the rate sued for. Reference to the administrative agency of the issue of unreasonableness where such defense is made has been recognized. *Montana-Dakota* (p. 253); *United States* v. *Western Pacific R. R. Co.* (1956), 352 U.S. 59; *United States* v. *Chesapeake & Ohio R. R. Co.* (1956), 352 U.S. 77, 81. Plaintiffs in *Davidson* and *T.I.M.E.* sought to escape this defense by claiming that *Montana-Dakota* rendered any *filed* rate immune to such attack. Bluntly, both courts rejected this assertion. They went no further in their opinions.

The Motor Carrier Act (Sec. 216, 49 U.S.C.A. 316), as the Fifth Circuit emphasizes, expressly preserved common law causes such as were there involved (p. 32-3 App. to petition for writ of certiorari, *T.I.M.E., Inc.* v. *United States of America*, (1958), 252 F. 2d 178 cert. pending, Oct. 1957 term. No. 1027). The District of Columbia Circuit stated express agreement with the Fifth Circuit. *United States of America* v. *Davidson Transfer & Storage Co.*, No. 14123, decided April 24, 1958 p-8 Folio opinion, cert. pending No. 1062 Oct. 1957 term). The Natural Gas Act contains no comparable reservation. Indeed, Congressional denial was deliberate. *Montana-Dakota, supra.* It is thus

submitted that neither *Davidson* nor *T.I.M.E.* are apropos to the issues here involved.

Willmut urges that it has suffered a loss of its constitutional right to a fact trial. This position Willmut presented to the State Court. It was rejected because no fact issue has ever existed. The facts are undisputed. The only dispute has been as to the legal conclusion to be reached, namely, whether the gas was "intrastate" or "interstate." Even if a fact issue had ever been available, it was foreclosed by the solemn stipulation of the parties filed in the Court: "that this court shall consider and determine this cause on the filed record, the pleadings and the stated exhibits" (R. 487). The complaint of Willmut in the State Court averred all of C-1158 as a matter of fact.

CONCLUSION

The decision of the Court below was correct; whereby the Petition for certiorari should be in all things denied, and it is respectfully so prayed.

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